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No. 81-.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

In re Wheat Farmers Antitrust Class Action Litigation M.D.L. No. 129

JOE ZINSER, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

JOHN SPEARMAN, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED*

Whether this Court's rule in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, rehearing denied, 434 U.S. 881 (1977), that a cause of action based on a horizontal price-fixing conspiracy can not be brought by a party removed more than one step in the distribution chain from the price-fixer, also bars every restraint of trade claim brought pursuant to 15 U.S.C. § 1?

Whether that rule in *Illinois Brick* also bars every attempted monopolization and monopolization claim brought pursuant to 15 U.S.C. § 2?

Whether an antitrust plaintiff, who brings a class action and is successful in certifying that class, has a claim of right to reimbursement for reasonable expenses, court costs and attorneys' fees based on the doctrine of *quantum meruit* once the cause of action has, *ex post-facto,* been judicially banned?

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* The parties hereto are:

1. Joe Zinser;
2. John Spearman;
3. All wheat farmers in thirty-four designated counties in the panhandle and adjacent areas of north Texas who sold wheat on the open market from May 1, 1972, until September 1, 1972;
4. All wheat farmers in Curry County, New Mexico, who sold wheat on the open market from May 1, 1972, until September 1, 1972;
5. Clarence Palmby;
6. Continental Grain Company.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is not yet officially reported, but is unofficially reported at 1981-2 *Trade Reg. Rp.* (CCH) ¶ 64,208 (10th Cir. dated August 6, 1981). (App. 1a). The Opinion of the Court of Appeals denying rehearing is not reported and appears in the Appendix (App. 19a). The Opinion of the District Court is not published and appears in the Appendix (App. 22a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 6, 1981. A timely petition for rehearing was denied on September 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

Pertinent portions of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and Section 4 of the Clayton Act, 15 U.S.C. § 15, are set forth in Appendix at 89a.

STATEMENT OF THE CASE

A. The Soviet Grain Deal of 1972

In the Soviet Union, the winter of 1972 produced minimal snowfall which was insufficient to replenish the Soviet soils of the usually productive Volga crop basin with desperately needed water. Consequently, the harvesting of Soviet winter wheat sowed in the Fall of 1971 was damaged by winterkill resulting in a dire need for a successful summer crop.

Coinciding with the mild winter was a summer high pressure system which parched the land and shriveled the entire crop. The light rainfall and the scorching temperatures caused by winds blowing oven-dry air from the Kazakh desert destroyed the basin's hope of curing the prior crop loss. The actual shortfall of the winter and summer crop resulted in a Russian need for an alternative source to cover some four hundred and nineteen million bushels of wheat.

Meanwhile, the inverse was occurring in the United States; the wheat crop exceeded expectations despite governmental attempts to pay farmers to plow under portions of seeded fields, grain elevators began filling to capacity, grain prices were depressed, and Commodity Credit Corporation wheat surpluses surpassed all time highs.

Plainly enough, the Soviet Union easily found the American wheat market ripe for a sale. The United States Department of Agriculture ("USDA") was not only ready, having forecasted the Soviet crop disaster through their network of scouts reporting on the harvest, but was overly eager to have the Soviets enter the grain markets in an attempt to alleviate a depressed market and raise for farmers the price they would acquire for their crops on the free open market before November's election. So eager was the United States that it determined to promote American-Soviet sales through an extension of credit.

Against that backdrop, one of the largest antitrust conspiracies in the history of this country was set into motion, targeted against the American wheat farmer. Continental Grain Company ("Continental") conspired with Clarence Palmby, ("Palmby"), then As-

sistant Secretary of Agriculture, to withhold and suppress from the wheat market the true demand for wheat.

A series of clandestine meetings were held early in 1972 in which Continental lured Palmby from the USDA through the offer of a lucrative executive position with Continental. It was while Palmby was involved in his transition from his position with the USDA to Continental's employment that Agriculture Secretary Butz gave Palmby the responsibility of preparing the negotiating scenario for the Russian wheat sale. Having already decided to leave the USDA for the private sector, Palmby coordinated and took an active role in the government-to-government negotiations. From his trip to Mascow, Palmby brought back valuable inside information concerning the Soviet's intentions, which he applied to the sole benefit of Continental.

Palmby then met with executives of Continental to prepare another scenario, this time one in which they would combine and conspire to restrain the market's trade and attempt to monopolize the sale of wheat to the Soviet Union. Recognizing their inability to maintain the then current price for wheat should news of the sale be made public, Continental and Palmby devised a scheme in which Continental could monopolize the wheat sale through the suppression of information concerning the sale to the Soviet Union. By withholding information, Continental and Palmby plotted, the true functioning of market forces, such as supply and demand, could be so tampered that the effect would be the maintenance of the market's then low price levels, enabling Continental to buy at

inordinately low prices from farmers and sell high to the Soviet Union.

Accordingly, Continental and Palmby combined and conspired to monopolize and restrain trade in the Soviet sale by interfering with market forces through such activities as Palmby's refusal to direct that sales be made on a government-to-government basis; that the terms of the proposed grain sales, required by federal law to be reported, be suppressed; Continental's submission of false government export documents; Continental's purchasing of CCC wheat at a depressed price; and Palmby's divulging the substance of Soviet negotiations to Continental, placing it in lucrative position of cornering the market.

B. The Decision of the District Court

In 1972, Joe Zinser and John Spearman filed separate class actions [1] in United States District Court for the Northern District of Texas alleging that Continental and Palmby had combined and conspired to restrain trade and that they attempted to, and did successfully, monopolize the grain sale to the Soviet Union in violation of Sections 1 and 2 of the Sherman Act. The two actions were consolidated by the Judicial

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[1] Zinser had filed his cause of action on the 16th day of November, 1972, on behalf of all wheat farmers similarly situated in thirty-four counties in the northern panhandle of the State of Texas.

Spearman had originally filed his cause of action on the 2nd day of January, 1973, on behalf of all wheat farmers similarly situated in Curry County, New Mexico. However, the class certification was solely those wheat farmers similarly situated in Curry County, New Mexico.

Panel on Multidistrict Litigation for pre-trial proceedings in the Western District of Oklahoma where a similar suit, *Cleveland* v. *Palmby*,[2] was pending.[3]

On June 30, 1975, the trial court certified the classes, consisting of all wheat farmers who sold wheat on the open marekt from May 1, 1972, until September 1, 1972, in their respective geographic regions.[4]

Discovery progressed until, in 1977, when this Court rendered its decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977). The trial court then granted an extension of time for discovery and requested briefs on the *Illinois Brick* issue.

On June 25, 1979, the trial court entered an order holding *inter alia*, *Illinois Brick* applied to all the claims[5] in all three cases, finding that *Illinois Brick*

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[2] Edgar W. Cleveland, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972, until September 1, 1972, v. Clarence Palmby, Continental Grain Company, Cargill, Inc., Louis Dreyfus Corp., Cook Industries, Garnac Grain Company and Bunge Corp., Civil Action No. CIV-72-731 (W.D.Ok. filed October 24, 1972). This case solely involved a Section 1 claim.

[3] *See In re Wheat Farmers Antitrust Class Action Litigation*, 366 F.Supp. 1087 (J.P.M.L. 1973).

[4] Zinser was named to represent a class of about 12,000 wheat formers in thirty-four counties in the panhandle of Texas. Spearman was named to represent a class of between 600 and 1,500 wheat farmers in Curry County, New Mexico.

[5] The district court dismissed both plaintiffs' Section 1 claim of restraint of trade and plaintiffs' Section 2 claim of monopolization and attempt to monopolize.

was dispositive of the claims; and determining that *Illinois Brick* precluded all antitrust causes of action, regardless of their characterization, by one who was more than one step removed in the distribution chain from the antitrust violator.

Both of these plaintiffs filed timely motions under *Fed. R. Civ. P.* 59. These motions, which raised some matters not referred to in the previous order of June 25, 1979, were treated in the trial court's subsequent order of November 13, 1979. The trial court was not persuaded to alter its ruling that *Illinois Brick* was applicable to the Sections 1 and 2 violations in these cases. Subsequently, the Court entered an Amendment to Judgment that same day, dismissing with prejudice the Sections 1 and 2 claims of all members of the classes who did not sell wheat directly to the defendant, Continental, and dismissing without prejudice the Section 1 and 2 claims of all the members of the class who did sell directly to Continental.

Timely notices of appeal were filed on December 5, 1979.

C. The Decision of the Court of Appeals

On appeal from the trial court's decision, the Court of Appeals sustained on all grounds but one * the trial court's decision. The court held, after so construing these "pre-*Illinois Brick*" pleadings as to find therein

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* One of the issues presented on appeal was the appropriateness of the trial court's refusal to remove a communications ban between plaintiffs' counsel and any member of the class where the communications was not initiated by the class member. In light of *Gulf Oil Co.* v. *Bernard*, —— U.S. ——, 44 U.S.L.W. 4604 (June 1, 1981, the Court of Appeals reversed the imposition of the trial court's unfounded and unsubstantiated ban.

"pass-on" allegations of an undercharge[7], that *Illinois Brick* applies to the matter at hand since "[i]t logically follows that an indirect seller . . . may not recover for an undercharge set in motion by the indirect buyer's unlawful activities," 1981-2 *Trade Reg. Rp.* (CCH) ¶ 64,208 at 73,784 (App. at 13), and held that *all* antitrust claims are barred from being presented in *Zinser* and *Spearman*. Additionally, the court held that no exceptions to *Illinois Brick* were present; that the district court did not abuse its discretion by failing to certify as a class the approximately three hundred wheat farmers who were direct sellers; and that there was no error in the district court's denial of plaintiff's request for attorneys' fees for efforts which resulted in class certification prior to this Court's holding in *Illinois Brick*.

The Court of Appeals believed that *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, *rehearing denied*, 616 F.2d 659 (5th Cir.), *cert. denied, Safeway Stores, Inc.* v. *Meat Price Investigators Association*, ——— U.S. ———, 101 S.Ct. 280 (1980), ("the *Beef Case*") applied the general rule of *Illinois Brick* in a fact situation believed to be akin to those presented in *Zinser* and *Spearman*.[8] Under *the Case*, the court

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[7] 1981-2 *Trade Reg. Rp.* (CCH) ¶ 64,208 at 73,782, n. 4 (App. at 7a).

[8] So fixated was the court with the *Beef Case* that it in fact molded these cases to the *Beef Case*'s facts. The court tailored the facts to fit the *Beef Case* so as to apply the Fifth Circuit's opinion. Contrary to actual market functions, the court found that the defendant Continental purchased wheat at lower prices from middlemen who, in turn purchased wheat from wheat farmers at reduced prices (App. 8a). In fact, the structure of wheat industry is one in which the wheat farmer sells his grain upon harvesting to the country elevator who, sometime later, will sell that grain to exporters or to millers. (Addendum A).

reasoned, the rule of *Illinois Brick* precluded antitrust actions by sellers who have not dealt directly with the antitrust violator. The court relied on the *Beef Case,* rather than subsequent antitrust decisions holding that there are limitations to applicability of *Illinois Brick.*[9] The court merely construed the pleadings to find allegations of a "pass-on" of an undercharge requiring application of *Illinois Brick.*

The Court never addressed the central issue of the appeal, which was the inappropriateness of applying *Illinois Brick* to a Section 1 claim of restraint of trade and to a Section 2 monopoly and attempt to monopolize claims based on a conspiracy to suppress true market conditions in the wheat industry.

REASONS FOR GRANTING THE WRIT

I. EMPHATIC DISTINCTIONS MUST BE MADE BETWEEN THE APPLICABILITY OF *ILLINOIS BRICK* TO PRICE FIXING CLAIMS AND ITS INAPPLICABILITY TO MONOPOLIZATION CLAIMS AND OTHER RESTRAINTS OF TRADE

A. There is Continuing Confusion and Conflict Among the Circuits

1. *The Court of Appeals Has Expanded the Rule of* Illinois Brick *Beyond the Parameters Established By This Court and Has Applied* Illinois Brick *to Antitrust Violations Clearly Not Intended By This Court.*

The Court of Appeals has, by its decision in this case, expanded the parameters of *Illinois Brick* to include

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[9] The Court of Appeals never addressed the allegations as pled. Rather, the Court insisted that the restraint of trade involving interferences with market forces was an allegation of a conspiracy to "pass-on" a pre-determined fixed price upwards through the chain of distribution. The Court further failed to address the Section 2 claims.

any antitrust violation which would have as one result the stablization of price. The court-below has re-interpreted *Illinois Brick's* fact situation to go beyond the intended horizontal conspiracy to fix the price of a product which was then forced through, or "passed-on", to intervening levels and has applied *Illinois Brick* to all contracts, combinations or conspiracies to restrain trade and monopolize the market, whose antitrust basis is removed from and unrelated to any distribution chain.

Illinois Brick was never intended to go beyond a situation involving a horizontal conspiracy to fix the price of a product, and to "pass-on" that fixed price in the chain of distribution. That factual situation is analytically distinct from the situation posed by this litigation's "pre-*Illinois Brick*" pleadings. These pleadings have, since their inception, claimed that Continental and Palmby conspired, contracted and combined to monopolize the Soviet Wheat Sale of 1972 and restrain trade in the wheat industry through the suppression of information required by law to be made public so as to interfere with the free play of market forces, such as supply and demand. There has never been, nor could there be, allegations that Continental and Palmby contracted, combined or conspired to establish the price of wheat at a specific predetermined rate of $1.35 per bushel, and then force that price upwards in the distribution chain.

The distinctions present can best be illustrated by the attached graphic depictions of the *Wheat Cases, Illinois Brick,* and the *Beef Case,* Exhibits A, B and C, respectively found in the Addendum herein. *Illinois Brick* can best be depicted, as in Exhibit B, as a horizontal conspiracy which had agreed to a pre-

determined fixed price which was forced downward through, or "passed-on" to, intervening levels, affecting the prices paid by the claimant, the consumer (see Exhibit B).

In comparison, the *Beef Case* was the "flip side" of *Illinois Brick*. There was pled a horizontal conspiracy which formulated a pre-determined fixed price, which forced that fixed price upward through, or "passed-on" to, intervening levels, which affected the price sold by the claimants, the producers (see Exhibit C).

In contradistinction, the *Wheat Case* does not involve a horizontal conspiracy, a "pass-on" or any levels of distribution. As demonstrated by Exhibit A, the pleadings emphatically show a contract, combination or conspiracy between Continental and Palmby, removed from the distribution chain, interfering with the normal market forces by suppressing and withholding all information of the then impending Soviet Wheat Sale. This suppressing of vital market information was done to gain a monopolistic advantage in the Soviet Wheat Sale and to restrain trade in the wheat industry to provide Continental with a more favorable position in the market.

The Southern District of New York has recently recognized this type of claim as being outside the rule of *Illinois Brick*. *Pollock* v. *Citrus Associates of the New York Cotton Exchange,* 512 F.Supp. 711 (S.D. N.Y. 1981). Dealing with antitrust claims that defendants had affected the price of November contracts by restricting supply of offsetting contracts, the court refused to find the case within the ambit of *Illinois Brick*. *Illinois Brick* does not apply to every anticompetitive behavior aimed at the plaintiffs. *Id.* at 719. In *Pollock,* where the allegations claim plaintiffs

suffered due to tampering with the entire market, the court did not bother to look for direct dealings to determine if plaintiffs could bring their cause to action.[10]

The Court of Appeals failed to recognize the distinction made by other courts between *Illinois Brick's* horizontal conspiracy to pre-determine a fixed price and to force that fixed price through a distribution chain and other types of restraints of trade or monopolization involving antitrust violators permeating the market from outside the distribution chain.

It seems clear that *Illinois Brick* would have no place in an antitrust claim involving a refusal to deal where the grain companies conspired in deciding they would boycott every Texas wheat farmer.[11]

Nor would there be a dispute that *Illinois Brick* is inapplicable to cases involving the establishing of territorial restraints or monopolies dividing trade territories among competitors, each competitor taking one state.[12]

And clearly *Illinois Brick* is inapposite to a monopolization claim where Continental's predacious act involved buying from farmers at inordinately high prices and selling to consumers at below cost in order to eradicate competition.[13]

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[10] *Cf. In re Airport Car Rental Antitrut Litigation*, 474 F.Supp. 1072, 1108 (N.D.Cal. 1979) (rationale of *Illinois Brick* will not be expanded to new situations).

[11] *See Klor's* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959).

[12] *See United States* v. *Topco Associates*, 405 U.S. 596 (1972); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951).

[13] *See Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980); *In re Japanese Electronic Products Antitrust Litigation*, 494 F.Supp. 1246 (E.D.Penn. 1980).

Since *Illinois Brick* was not designed to be extended beyond a horizontal conspiracy to fix prices intended to be "passed-on", a conspiracy to interfere with the natural workings of the entire competitive market and its forces of supply and demand is simply inapposite. This type of conspiracy was the same addressed by this Court in *United States* v. *Patten*, 226 U.S. 525 (1913), where the interference with market forces was performed by the buying of all the available cotton. The end result was distortion of the market place, with a "price-related" result of pegging or stabilizing price. However, the action was not based on a "pass-on" theory of price fixing, and today would not be barred by *Illinois Brick*.[14]

Similarly, *Illinois Brick* would have no application to an agreement to exchange confidential business information among competitors and suppress information from buyers. While this practice, too, distorts market forces and gives these competitors a superior bargaining position by reason of the collaboration to withhold market information from buyers, *Illinois Brick* was not limited to include such "price-related" activities.[15]

So, too, this Court never intended *Illinois Brick* to apply to claims of monopolization and restraint of trade involving an interference with market forces which would suppress true market information and which, while not involving a "pass-on" of predetermined fixed prices, would involve a "price-related" result of stabilizing prices.

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[14] *See also United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

[15] *See Maple Flooring Manufacturers' Associates* v. *United States*, 268 U.S. 563 (1925). *See also F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948).

Illinois Brick was simply intended to apply to a restraint of trade involving a horizontal conspiracy to fix a price of a product brought by a party who suffered injury solely as a result of that fixed price being forced through the chain of distribution.

Continental and Palmby did not conspire to arrive at a pre-determined fixed price; did not conspire with others on Continental's level to arrive at a pre-determined fixed price; did not force that pre-determined price upward to the producer. Rather, upon the pleadings, Continental and Palmby conspired to interfere with normal market forces and the laws of supply and demand in order to monopolize the Soviet Wheat Sale and restrain the wheat trade, thereby withholding from the farmer the true picture of the market. This tampering occurred outside the chain of distribution and was aimed directly at the wheat farmers.

Accordingly, this Court needs to make clear that *Illinois Brick* was never intended to be extended as lower courts have done. The importance of a clear distinction to the future enforcement of the antitrust laws compels this Court's review.

2. *The Wheat Decision Creates a Split in the Circuits on the Question of the Scope of* Illinois Brick *and Denies Petitioner Equal Protection of the Laws*

The decision of the Court of Appeals in this case reflects an irreconcilable conflict among the circuit and district courts concerning the issue upon which review is sought. Differing judicial interpretations of the proper scope of the rule of *Illinois Brick* have produced an area of the law in which there is confusion and clear need for guidance from this Court.

The Third Circuit Court of Appeals first addressed the issue of applying *Illinois Brick* to matters other than horizontal conspiracy to "pass-on" a fixed price. *Mid-West Paper Products* v. *Continental Group, Inc.*, 596 F.2d 573 (3rd Cir. 1979). That court indicated that it would only apply *Illinois Brick* to cases clearly coming with the same fact pattern:

> A different problem is presented . . . where defendants engage in other forms of anticompetitive conduct, such as group boycotts, vertical restrictions or *monopolization*, since defendants' benefits in those instances are not so readily ascertainable and may not be sufficient to compensate "those individuals" whose protection is the primary purpose of the antitrust laws."

Id. at 585 n. 47 (emphasis added).

District courts within the Third Circuit interpreted *Illinois Brick*, in conjunction with *Mid-west Paper*, to apply solely in situations involving overcharges passed-on through chains of distribution. *See In re Japanese Electronic Products Antitrust Litigation*, 494 F.Supp. 1246 (E.D.Penn 1980) (antitrust violations are not required to be traced through a seller's distribution network in each instance to be cognizable under the antitrust law);[16] *Dart Drug Corp.* v. *Corning Glass Works, Inc.*, 480 F.Supp. 1091, 1101 (D.Md. 1979) (rationale of *Illinois Brick* makes it "abundantly clear" that suit is barred "only . . . where plaintiff's

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[16] *See also Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Cromar Co.* v. *Nuclear Materials and Equipment Corp.*, 543 F.2d 501 (3rd Cir. 1976).

injury is premised on an 'overcharge' and where proof of pass-on is required").[17]

The Seventh Circuit Court of Appeals also refused to extend the rule of *Illinois Brick* beyond situations involving injuries alleged to have been passed through a single distribution chain. *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). The court found a "multi-faceted conspiracy" which, after consideration of the alleged activities as a whole, not after piecemeal inspection of the result, did not fit within the rule of *Illinois Brick* despite Fontana's absence of purchasing directly from Cessna.[18]

On August 6, 1981, the Tenth Circuit Court of Appeals in the *Wheat Case* had its first occasion to address the application of *Illinois Brick* to antitrust matters and has adopted an interpretation opposite that of Third and Seventh Circuits. The decision of the Tenth Circuit in the present case, which gives the rule of *Illinois Brick* a broad reading, applying it *mutatis mutandis* to a situation very different from that in which the rule was made, is at variance with those decisions which have held that *Illinois Brick*

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[17] *See Engine Specialties, Inc.* v. *Bambardier, Ltd.*, 605 F.2d 1, 18 (1st Cir. 1979) (*Illinois Brick* "involved a narrow question concerning the offensive use of the 'pass-on' rule . . ."); *Reading Industries, Inc.* v. *Kennecott Copper Corp.*, 477 F.Supp. 1150, 1158 (S.D.N.Y. 1979) (*Illinois Brick* presents a "narrow holding"); *In re Airport Rental Litigation*, 474 F.Supp. 1072, 1108 (N.D.Cal. 1979) (rationale of *Illinois Brick* will not be expanded to new situations).

[18] *Accord, Reiter* v. *Sonotone Corp.*, 406 F.Supp. 115 (D.Minn. 1980); *Florida Power Corp.* v. *Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978).

states a narrow rule which should not be expanded beyond the facts of the case.[19]

Stating that the defendant did not purchase directly from the plaintiff, without addressing the alleged restraint of trade and monopolization claims as alleged in the complaint,[20] the court held that all antitrust claims were barred by the rule of *Illinois Brick*. The court never addressed the pleadings' contentions [21] that the antitrust violation was not a horizontal conspiracy in the chain of distribution, but rather that the anti-

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[19] *See* note 17, *infra*.

[20] These cases have, since their inception, have never alleged a "pass-on" of a pre-determined fixed price, established by a horizontal conspiracy, forced into intervening levels of the chain of distribution. *Zinser* and *Spearman* have always alleged a restraint of trade due to the suppression of information. (*See Zinser*—App. at 56a-57a, 59a-60a, 62a, 63a, 64a, 65a-66a; *Spearman*—App. at 75a-76a, 77a-78a, 79a, 81a-82a, 83a, 84a-87a). The pleadings have stated that the true market force were attended from outside the distribution chain which left the price of wheat suppressed to a range of prices which would exist if, in a freemarket, there was a limited demand for wheat. The price of wheat would still fluctuate, but never elevate to the level had the market forces not been tampered. If plaintiffs had not first incurred the antitrust violations, the conspiracy by the defendants to restrain trade would never have been successful. Additionally, the Court did not address the complaints' allegations of defendant's attempt to monopolize of the Soviet Wheat Sale.

[21] This holding is incompatible with the rule recently reiterated by this Court that complaints must be liberally construed in favor of the pleader, *see McLain* v. *Real Estate Board of New Orleans, Inc.*, —— U.S. ——, 100 S.Ct. 502 (1980), a policy which has particular force in an antitrust case, *see Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130-131 (1969); 68 U.S. 563 (1925). *See also F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948).

trust violation was in the nature of interference with exterior forces which influenced the wheat market. Additionally, the court never addressed the positions maintained by the Third and Seventh Circuit Courts of Appeals.

The District Court in the Southern District of New York recently addressed an issue similar to that presented here, in *Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F.Supp. 711 (S.D.N.Y. 1981). In *Pollock*, the allegations claimed that plaintiffs suffered due to the tampering with the entire market resulting from defendant's restricting of the supply of November contracts from outside the distribution chain. *Id.* at 719.

Only this Court can resolve the clear split now existing between the Circuits on this very issue. The federal laws were intended to apply, and must be applied, uniformly to all persons subject to those laws. The lack of similar treatment among persons seeking to sue under the antitrust laws, depending solely upon the circuit in which the suit is filed or to which the Multidistrict Litigation Panels removes, creates a clear and arbitrary denial to *Zinser* and *Spearman* of the equal protection of the laws as guaranteed to them by the Fifth Amendment to the United States Constitution.[22]

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[22] The Fifth Amendment to the United States Constitution does not specifically contain an equal protection clause. However, this protection has been implied under the Amendment's due process clause. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225 (1975); *Schneider* v. *Rusk*, 377 U.S. 163, 168, 88 S.Ct. 1187 (1954); *Shapiro* v. *Thompson*, 394 U.S. 618, 641-42, 89 S.Ct. 1322 (1969); *Bollinger* v. *Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954).

B. The Circuit Court's Opinion Is In Direct Contradiction With Long-Standing Holdings of This Court

Illinois Brick involved a horizontal conspiracy to fix the price of a product which was then forced through, or "passed-on" to, intervening levels. It is this type of antitrust violation, and only this type, which this Court specificallly intended to judicially ban. The intent of this Court was to adopt "a unified 'mutuality' approach to 'passing-on' problems. . . ." *In re Beef Industry Antitrust Litigation,* 600 F.2d at 1157. The allegations of the present complaints, which predate this Court's rendering of *Illinois Brick,* emphatically demonstrates absence of "passing-on" price-fixing allegations. Rather the complaints are replete with allegations referring to defendant's conspiring to illegally withhold market information from the public.

Illinois Brick itself is a sharp departure from prior precedent, and difficult to reconcile with those cases which emphasize the breadth of the remedy of the antitrust laws. It is well noted by this Court that a distinct antitrust violation arises where the conspiracy's aim is to tamper with the entire market place in an attempt to monopolize and restrain trade industry-wide. This Court early held, in *United States* v. *Patten,* 226 U.S. 525, with regard to defendant's cornering of the cotton market, as follows:

> It may well be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand,* withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and

> consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition.

Id. at 542 (emphasis added).

Additionally, a market controlled by a participant who dictates the interaction of market forces is analytically distinct from a horizontal price-fixing conspiracy "passing-on" a specified, pre-determined price. *See United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

The Court of Appeal's opinion directly contradicts this Court's decision involving the application of the antitrust laws to violators affecting the entire industry:

> [Section 4] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers . . . but is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.

Mandeville Island Farms, Inc. v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

In fact, this Court, in its *Illinois Brick* opinion, neither explicitly nor implicitly overruled the decisions which incorporates these policies and, in fact, partly ratified them by reference to "the long-standing policy of encouraging vigorous private enforcement of the antitrust laws." 431 U.S. at 745. The Court also noted, in the *Illinois Brick* opinion itself, that "considerations of *stare decisis* weigh heavily in the area of statutory construction," and pointed out further that there is a "presumption of adherence to prior decisions." 431 U.S. at 737.

The petition for certiorari should be granted to clarify this confused area of the law, to provide the guidance necessary to produce consistent judicial interpretations of the scope of the rule and its relationship to prior precedent, and to safeguard the enforcement of the antitrust laws. *See Perma-Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 136 (1967); *Calhoun* v. *Harvey*, 379 U.S. 134, 137 (1964).

II. ILLINOIS BRICK IS INAPPOSITE TO THE MATTER AT HAND

A. The Attendant Problems of the "Pass-On" Theory in Antitrust Cases are not Present in These Cases

1. *There Are No Apportionment Concerns Nor Tracing of Damages in these Cases*

These causes of action pose no apportionment problem because plaintiffs have not made claim to damages traced through a chain of distribution. The allegations of the Amended Complaints assert damages resulting from a suppression of information to the public. The measure of damages would be the damage suffered by reason of the violation, *i.e.* based on what the market would have been but for the conspiracy.

In contrast, the problem addressed by this Court in *Illinois Brick* is a problem of tracing an overcharge to, and overpayment by, a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the overcharge might be absorbed by the payer.

In this action, however, there is no incremental tracing of damages through a distribution chain since the antitrust violation occurred separate and apart from the chain of distribution. The interference with market

forces occurred before price became a factor, distorting all factors subsequent to the violation. The wheat farmers were the direct recipients of the injury caused by the defendants. Therefore, any apportionment of damages will be only among the wheat farmers—the first and direct parties injured by the violation—not, as in *Illinois Brick,* among successive levels of the market itself.

2. *There is No Duplicative Recovery Claimed*

Since there have been no allegations of a "pass-on" of a fixed price, it is apparent that this Court's concerns expressed in *Illinois Brick* of duplicative recovery are not involved in these plaintiffs' claims. The allegations clearly demonstrate that the antitrust injury was inflicted from outside the distribution chain, (*i.e.* interference with true market conditions before these conditions were considered by distribution chain members) and were targeted at the plaintiffs, consequently forcing the violation's affects from plaintiffs' level downward through the distribution chain. If plaintiffs did not first incur the antitrust violations, the conspiracy by the defendants would never have been successful. Plaintiffs make no claim to damage recoverable by any party closer to antitrust violation.

3. *These Cases Do Not Affect This Court's Rulings Involving the Offensive and Defensive Use of the "Pass-On" Theory*

This Court's concern in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.,* 392 U.S. 481 (1968) that defendants not avail themeselves to the defense that plaintiffs have "passed-on" the overcharge is not viable in this case. Nor is this Court's rule concerning

offensive use of "pass-on" in *Illinois Brick* a concern in this litigation.

Since no "pass-on" allegations exist, this Court need not alter its *Hanover Shoe* or *Illinois Brick* decisions. Plaintiffs, as producers, were the first parties injured by the antitrust violations. Defendants can neither claim that Plaintiffs were not injured by passing an artificial price—a price lower than it would have been but for the antitrust violations—on to the next level, nor can they claim plaintiffs were indirectly injured since plaintiffs were the originators of the produce in the stream of commerce.

4. *There Is No Complexity or Uncertainty of Proof Involved Which Would Be Contrary to* Illinois Brick

While there will indeed be complex proof, the kinds of proof involved are not new to courts and certainly not to antitrust courts. *In re Beef Industry Antitrust Litigation,* 600 F.2d at 1166. The complexity in which this Court expressed reservation in *Illinois Brick* deals solely with the complexity involved with economics of relevant elasticities of the product—"the percentage change in quantities of the passer's product demanded and supplied in response to a one percent change in price." *Illinois Brick,* 431 U.S. at 742.

This cause is devoid of such complexity and uncertainty. The appropriate measure of damages would merely be the difference between what each farmer was paid and what each farmer should have been paid but for the interference with market force. There are no factors of relevant elasticities, as in *Illinois Brick,* associated with factors which influence a party's decision whether to buy, not buy, or buy a suitable substitute product. All this litigation is concerned with

was the amount of wheat each farmer sold into an artificial market. The condition of the market but for the conspiracy was the actual condition it was in once the news of the Soviet sale was made public, the market price of late September—early October, 1972.

5. *There Can Not Be Duplicate Recovery By Any Other Market Participants*

The federal antitrust statute of limitations, 15 U.S.C. § 15b [23], prohibits an antitrust cause of action from being filed which is not commenced within four years after the cause of action accrues.[24]

There have not been any causes of action brought by any other party removed from these plaintiffs in the chain of distribution since the date of all activities giving rise to these causes of action. Consequently, these plaintiffs are the only parties capable of bringing these claims arising out of the defendants' antitrust activities.

III. PLAINTIFFS SHOULD BE ENTITLED TO REIMBURSEMENT OF REASONABLE EXPENSES, COURT COSTS AND ATTORNEYS' FEES

This litigation, commenced in 1972, had progressed through years of discovery on the merits and on the class issue before its dismissal. In 1975, the plaintiffs

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[23] Any action to enforce any cause of action under Sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections." 15 U.S.C. § 15b.

[24] *See In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68 (9th Cir. 1979), *cert. denied*, 444 U.S. 900 (1979).

were successful in having the district court certify the classes in their respective geographic regions.

However, the district court, in 1979, decertified the classes and dismissed the causes of action solely on the basis of *Illinois Brick*. It would only seem equitable, should this Court not find the district court erred in its application of *Illinois Brick*, that the plaintiffs be reimbursed the reasonable expenses, court costs and attorneys' fees, based on the doctrine of *quantum meruit*, for the years of legal services which would have been productive but for the subsequent holding of *Illinois Brick*.

This Court should review the matter to determine whether an antitrust plaintiff, who brings a class action and is successful in certifying that class, has a claim of right to reimbursement for reasonable expenses, court costs and attorneys' fees based on the doctrine of *quantum meruit* once the cause of action has, *ex post-facto*, been judicially banned.

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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December 1, 1981

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served the within Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit, upon all counsel of record in these proceedings contained within the most recent attorneys list, on the 1st day of December, 1981.

/s/ JAMES W. WITHERSPOON

JAMES W. WITHERSPOON

ADDENDUM

WHEAT FARMERS CASES

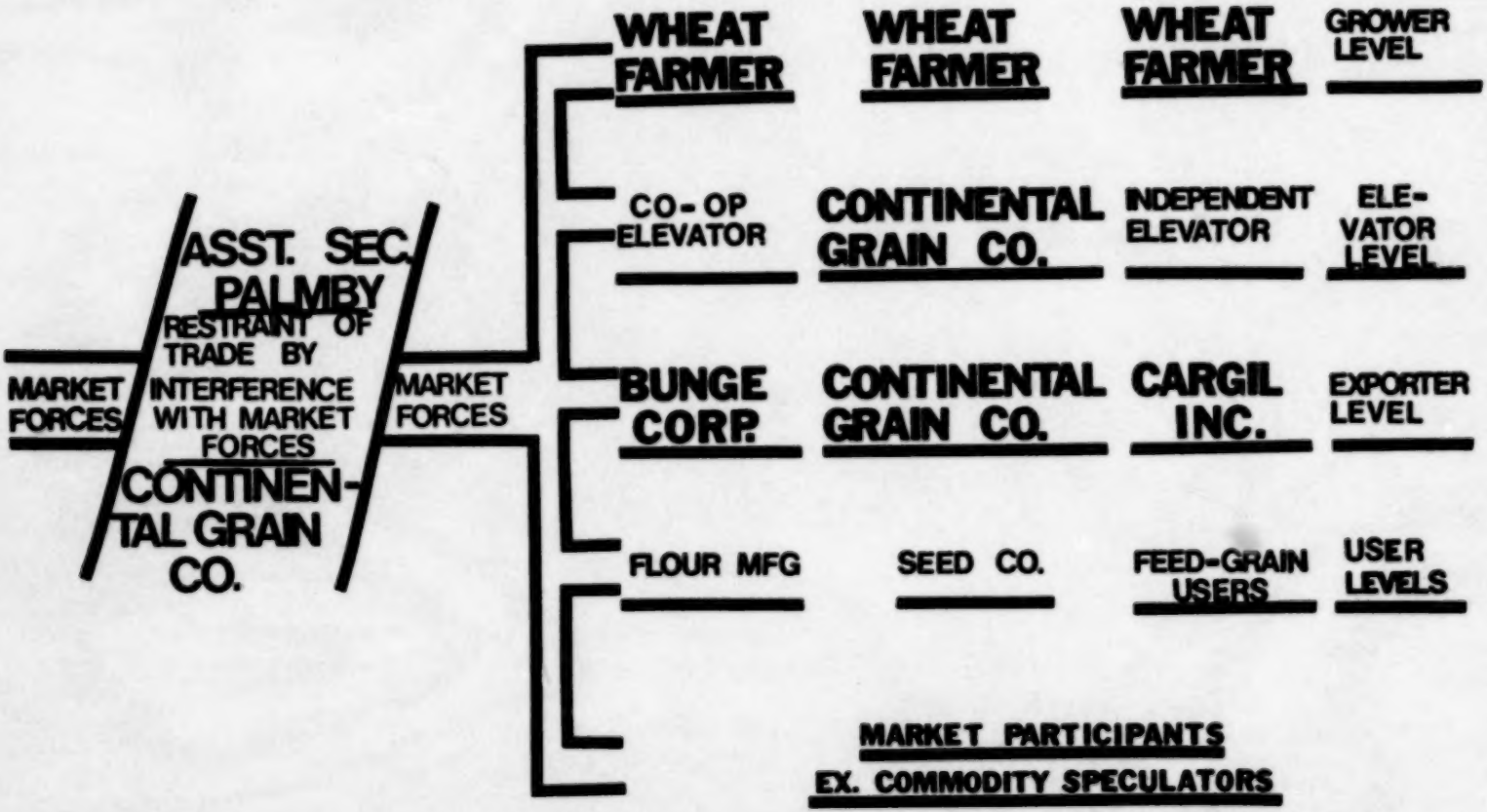

EXHIBIT A

ILLINOIS BRICK COMPANY v. ILLINOIS

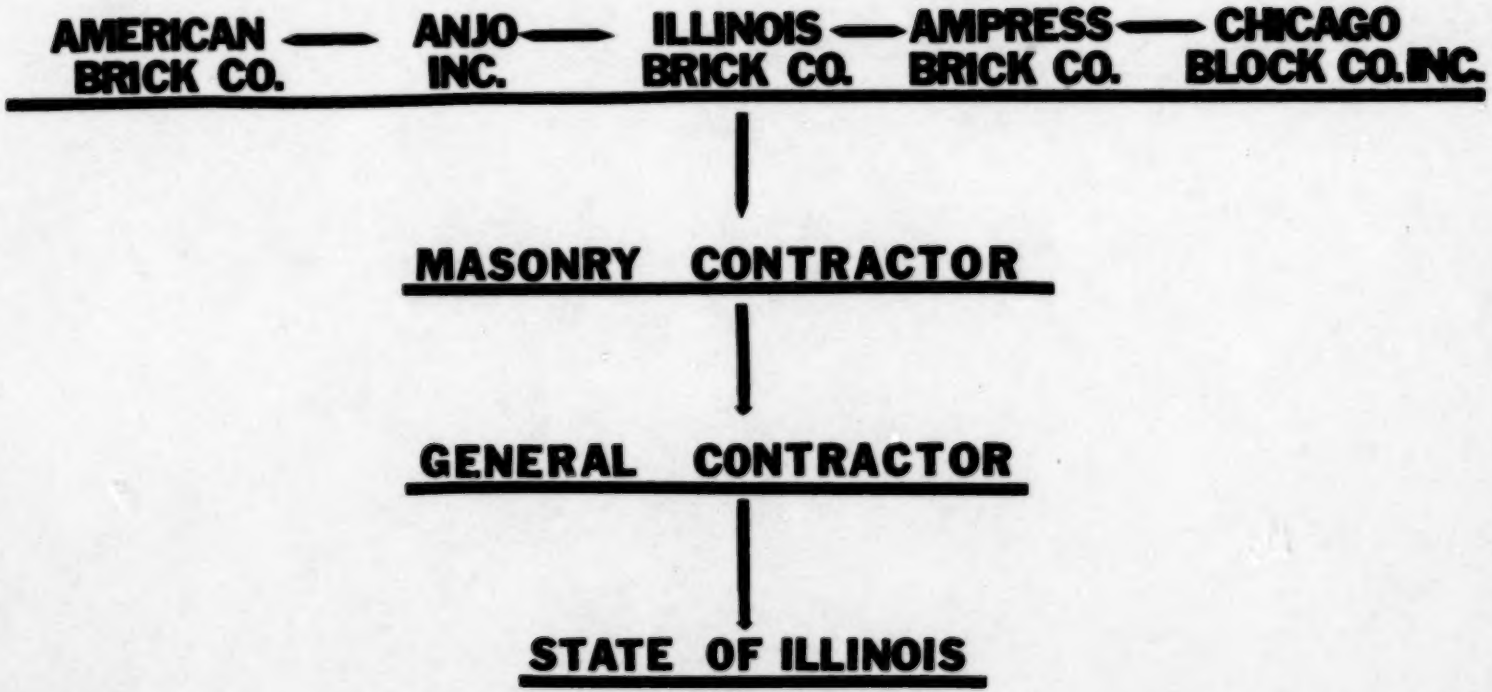

EXHIBIT B

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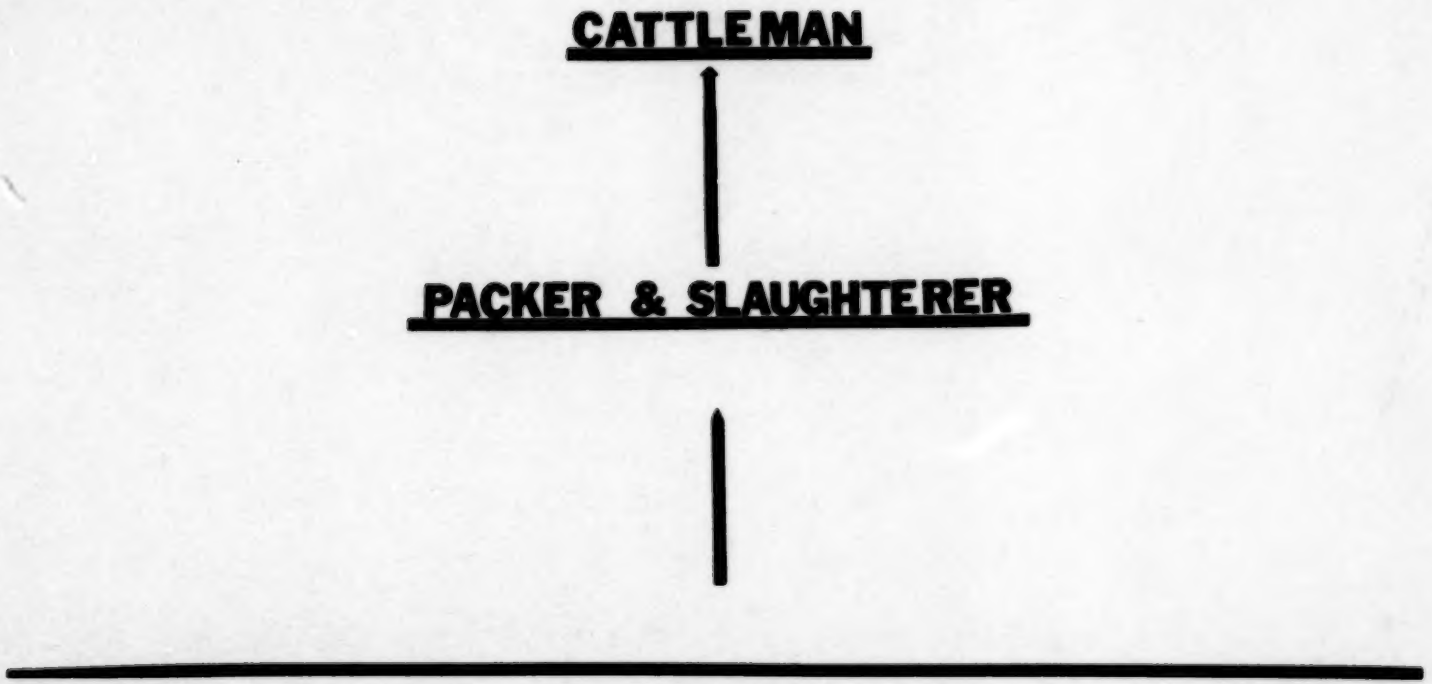

EXHIBIT C

81-1021
No. 81-.....

Office - Supreme Court, U.S.
FILED
DEC 1 1981
ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

In re Wheat Farmers Antitrust Class Action Litigation M.D.L. No. 129

JOE ZINSER, individually, and on behalf of all others similarly situated,
Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Respondents.

JOHN SPEARMAN, individually, and on behalf of all others similarly situated,
Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse
Denver, Colorado 80294

August 6, 1981

To: ALL COUNSEL

Re: No. 79-2296; 79-2310—In Re Wheat Farmers Antitrust Class Action Litigation

Dear Counsel:

Enclosed is a copy of the opinion of the Court in the captioned cause. Judgment in accordance with the opinion has been entered today.

Sincerely yours,

/s/ HOWARD K. PHILLIPS
Howard K. Phillips, Clerk

Enclosure

cc: Honorable Frederick A. Daugherty

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8-6-81 79-2296—79-2310

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Appeal from the United States District Court for the Western District of Oklahoma

(Filed August 6, 1981)

(D.C. No. CIV 73-779-D)

JOE ZINSER, et al., *Plaintiffs-Appellants,*

v.

CONTINENTAL GRAIN COMPANY, et al., *Defendants-Appellees.*

No. 79-2296 (Consolidated)

(D.C. No. CIV 73-780-D)

JOHN SPEARMAN, et al., *Plaintiffs-Appellants,*

v.

CONTINENTAL GRAIN COMPANY, et al., *Defendants-Appellees.*

No. 79-2310

(D.C. No. CIV 72-731-D)

EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
Plaintiffs-Appellants,

v.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Defendants-Appellees.

Joseph Alioto of Alioto & Alioto, San Francisco, California (James W. Witherspoon, Earnest L. Langley, Marion J. Craig III, and James E. Elliott of Witherspoon, Aikin & Langley, Hereford, Texas; and Michael T. Garrett of Law Offices of Michael T. Garrett, Clovis, New Mexico, with him on the brief), for Plaintiffs-Appellants in No. 79-2296; and (Frank Gregory, Tulsa, Oklahoma, and John M. Merritt of John M. Merritt, Inc., Oklahoma City, Oklahoma, for Plaintiffs-Appellants in No. 79-2310).

Mark H. Alcott (Simon H. Rifkind, Arthur L. Liman, and Lewis R. Clayton of Paul, Weiss, Rifkind, Wharton & Garrison, New York, New York; Judson S. Woodruff, Peter B. Bradford, John N. Hermes, and Lor Ann Ables of McAfee & Taft, Oklahoma City, Oklahoma; Neal E. Ar[illegible] of Culton, Morgan, Britain & White, Amarillo, Texas, Attorneys for Defendant-Appellee Continental Grain Company; and Robert J. Emery and James M. Gaitis of Robert J. Emery & Associates, Oklahoma City, Oklahoma, Attorneys for Defendant-Appellee Clarence D. Palmby, on the brief).

Before SETH, Chief Judge, and McWILLIAMS and DOYLE, Circuit Judges.

McWILLIAMS, Circuit Judge.

These three antitrust cases were brought by wheat farmers in Oklahoma, Texas, and New Mexico against six grain export companies and a former governmental official. The two defendants named in all three complaints are Continental Grain Company, a Delaware corporation with its principal place of business in New York City, and Clarence D. Palmby, a former Assistant Secretary of the United States Department of Agriculture.[1] The central issue in

[1] The other five grain companies, named as defendants in only one of the three cases, are Cargill, Inc.; Louis Dreyfus Corp.; Cook Industries, Inc.; Garnac Grain Co., Inc. and Bunge Corp. These companies are named as defendants in the case in which Edgar W.

these consolidated appeals is the applicability of Illinois Brick Co. v. Illinois, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977). The trial court ruled that *Illinois Brick* controlled and dismissed all three actions. The plaintiffs appeal.

The three complaints with which we are concerned were filed between October, 1972, and January, 1973, in the United States District Courts for the Western District of Oklahoma and the Northern District of Texas. In November, 1973, the cases were consolidated for pretrial proceedings in the Western District of Oklahoma by order of the Judicial Panel on Multidistrict Litigation pursuant to 28 U.S.C. § 1407 (1976). In re Wheat Farmers Antitrust Class Action Litigation, 366 F.Supp. 1087 (J.P.M.L. 1973).[2]

The trial court on June 30, 1975, certified three classes, consisting of wheat farmers who had sold wheat on the open market from May 1, 1972, until September 1, 1972, in the following geographic areas: (1) the state of Oklahoma

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Cleveland, an Oklahoma wheat farmer, is the named plaintiff representing Oklahoma wheat farmers. *See* note 3 *infra*.

Continental Grain and Clarence D. Palmby, former Assistant Secretary of the United States Department of Agriculture, were named as defendants in all three cases. A central allegation is that Palmby, who was hired by Continental after the grain sales were completed, was bribed by Continental. According to the plaintiffs' theory, Palmby exchanged confidential government information about the grain sales for a position with Continental.

[2] In addition to the decision consolidating these cases, there have been two other published opinions during the nine-year history of this litigation. In re Wheat Farmers Antitrust Class Action, 440 F. Supp. 1022 (D.D.C. 1977), was a case in which Judge Sirica considered a motion to produce certain documents, which the Government claimed were classified and subject to a claim of executive privilege. Cleveland v. Palmby, 75 F.R.D. 654 (W.D. Okla. 1977), dealt with the taking of a deposition of an employee of defendant Cook Industries, Inc.

(the Cleveland case); (2) thirty-four counties in the Northern Panhandle region of the state of Texas (the Zinser case); and (3) Curry County, New Mexico (the Spearman case).[3]

The three complaints here involved are almost identical in their content. In each instance the action was instituted under the authority of sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 22 (1976) to recover treble damages for violations of the antitrust laws. Cleveland alleged only antitrust violations under section 1 of the Sherman Act, 15 U.S.C. § 1. Zinser and Spearman alleged violations under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1976).[4]

The central allegation of all three complaints is that Continental Grain Company and Clarence Palmby, and others, conspired in 1972 to suppress information regarding impending wheat sales to the Soviet Union. The Plaintiffs' theory of the case is that this conspiracy resulted in a de-

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[3] The three cases were:

(1) Cleveland v. Palmby. Named Plaintiff Edgar W. Cleveland represented a class of about 43,000 Oklahoma wheat farmers. In addition to Continental and Palmby, there were five other grain companies which were named as defendants. *See* note 1 *supra*.

(2) Zinser v. Continental Grain Co. Named Plaintiff Joe Zinser represented a class of about 12,000 wheat farmers in thirty-four designated counties in the Panhandle and adjacent areas of north Texas.

(3) Spearman v. Continental Grain Co. Named Plaintiff John Spearman represented between 600 and 1,500 wheat farmers in Curry County, New Mexico.

[4] The injury complained of was the same in each instance, *i.e.*, that, because of the alleged conspiracy, the plaintiffs sold their wheat at artificially depressed prices. In practical effect, all of the claims amount to contentions that, because of the defendants' actions, prices were fixed at artificially low levels, thereby benefitting the defendants to the detriment of the several plaintiffs.

pressed market condition, thereby allowing Continental Grain and other grain exporters, to buy wheat from "middlemen"[5] at lower prices that would have been the case if the information had not been suppressed. According to the complaints, since the middlemen sold wheat to the grain exporters at lower prices than would have been paid in the information about forthcoming sales to the Soviet Union had been publicly known, the middlemen, in turn, purchased wheat from the wheat farmers at reduced prices. It was on this general theory that the plaintiffs claimed antitrust violations and treble damages.

Needless to say, there was extensive discovery. It eventually developed during the course thereof that none of the three named plaintiffs sold any wheat directly to any defendant during the time period here involved. Instead, each sold to a middleman, who in turn sold to Continental Grain, or some other grain exporter. Furthermore, discovery also disclosed that the vast majority of the class members did not sell to any defendant, but rather sold their wheat to middlemen, who, in turn, sold either to someone else in the distribution chain, or to one of the defendants. In fact, not more than ninety-two members of the Cleveland class, consisting of 43,000 Oklahoma farmers, sold directly to Continental; not more than 212 members of the Zinser class, consisting of 12,000 Texas farmers, sold to Continental; and only sixty-two members of the Spearman class of between 600 and 1,500 New Mexico farmers sold directly to Continental.[6]

As mentioned, the instant cases were instituted in 1972 and 1973, and were certified as class actions in 1975. Dis-

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[5] Midddlemen include such entities as county grain elevator companies and farmer co-operatives.

[6] These numbers were supplied by counsel for Continental at the request of the District Court. The information was taken from Continental's records.

covery continued unabated throughout this time, and after. Then, on June 9, 1977, the Supreme Court announced its decision in *Illinois Brick*. In order to allow the parties an opportunity to consider the applicability of *Illinois Brick*, the trial court granted an extension of time to permit additional discovery and submission of briefs on the matter. The trial court also held a hearing at which counsel presented their respective positions on the matter. Finally, on June 25, 1979, the trial court entered an order holding that *Illinois Brick* applied to the instant cases and was in fact dispositive thereof. More specifically, the trial court held that *Illinois Brick* precluded an antitrust action by one who was only an "indirect seller" to the defendants, an "indirect seller" being one who did not deal directly with any defendant, but rather sold his wheat to a middleman who, in turn, sold either to a defendant or to some other link in the distribution chain.

As above indicated, none of the three class representatives, *i.e.*, Cleveland, Zinser,, or Spearman, sold his wheat directly to any defendant, and there were only a total of not more than 366 farmers in all three classes who sold their wheat directly to the defendants. The trial court found that, under the circumstances, a continuation of the class actions was not warranted. Accordingly, with the three class representatives unable to proceed further under *Illinois Brick*, the trial court, applying Fed. R. Civ. P. 23(a), declined to recertify the classes. The trial court then dismissed all actions "without prejudice."

Both the plaintiffs and defendants filed timely motions under Fed. R. Civ. P. 59. These motions were disposed of by order on November 13, 1979. In that order the trial court adhered to its earlier ruling that *Illinois Brick* barred recovery by all persons who did not sell their wheat directly to one of the defendants during the pertinent time frame. The trial court also adhered to its earlier ruling that, all factors considered, those relatively few farmers who had sold their wheat directly to one of the defendants during

the pertinent time period would not be allowed class certification.

Numerous matters not referred to in the trial court's order of June 25, 1979, were raised by the Rule 59 motions and disposed of in the order of November 13, 1979. Specifically, the several plaintiffs sought leave to amend their pleadings so that the actions could proceed as ones based on fraud and deceit and civil conspiracy, with jurisdiction based on diversity. The trial court denied this request on several grounds, the primary one being that the request to amend came "too late," namely, some seven years after commencement of the litigation, and that the cases from their inception were based on alleged antitrust violations. In the same vein, the trial court noted that even after *Illinois Brick* was announced, the plaintiffs made no effort to amend until the trial court determined that *Illinois Brick* barred the present proceeding. The trial court also declined to award the plaintiffs their costs or attorney fees on the ground that they had not prevailed. Zinser and Spearman by their post-trial motion requested that their cases be transferred back to the United States District Court for the Northern District of Texas. This request was also denied.

Finally, a request was made that the trial court vacate a protective order entered on January 4, 1974. That order precluded all the named parties and counsel from initiating any communication with the class members without the prior permission of the court.[7] This order was apparently entered by consent of all parties. In his post-trial motion counsel for the plaintiffs asked that the order be rescinded

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[7] All parties and their lawyers were ordered not to *initiate* any communication with potential and actual class members who were not named parties. The order, which was proposed by counsel for the defendants, specifically stated that the lawyers *were* permitted to communicate with prospective clients when the contract was initiated by the prospective client rather than the attorney. The order was aimed a preventing client solicitation.

so that the members of the three classes could be advised as to the current status of the case. The trial court denied this request.

The defendants also filed a post-judgment motion under Rule 59(e) and 60(a), requesting clarification of the June 25, 1979, order. The trial court granted this motion and amended its earlier order to provide that the claims of all members who did *not* sell directly to any defendant were dismissed *with* prejudice, and that the claims of those who *did* sell directly to a defendant were dismissed *without* prejudice. Plaintiffs next filed a timely notice of appeal.

As indicated at the outset, the central issue concerns the applicability of *Illinois Brick*. The appellants' basic position is that *Illinois* Brick simply does not apply. The trial court did not agree with this argument. Nor do we.

In Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, *rehearing denied*, 393 U.S. 901 (1968), the precursor of *Illinois Brick*, the plaintiff, a shoe manufacturer, sought treble damages from the defendant, a manufacturer and distributor of shoe machinery. The plaintiff, who was a customer of the defendant, alleged that the defendant had monopolized the shoe machinery industry and unlawfully initiated the practice of only leasing some of its machinery to the plaintiff, rather than selling it outright to the plaintiff. As a result, according to the plaintiff, there was, in effect, an overcharge, which was the difference between what the plaintiff paid defendant in shoe machine rentals and what it would have paid had defendant been willing to sell the machines. 392 U.S. at 483-84.

The defendant in *Hanover Shoe* claimed that the plaintiff had suffered "no legally cognizable injury," since the plaintiff had passed on any illegal overcharge to its customers in the form of a higher price on its shoes. The District Court rejected this pass-on defense, and the Court of Appeals affirmed. On certiorari, the Supreme Court also affirmed. The Supreme Court held that when a buyer shows

that the price paid by him is illegally high, and also shows the amount of such overcharge, he has made out a *prima facie* case of injury and damage under section 4 of the Clayton Act, and that the fact that the buyer may have later passed on the amount of the overcharge to his customers does not defeat his cause of action. In other words, a pass-on theory could not be used by way of defense.

In *Illinois Brick*, the plaintiffs attempted to use a pass-on theory by way of offense. There the plaintiffs, the State of Illinois and 700 other governmental entities, claimed treble damages on the ground that the defendants had engaged in a price-fixing conspiracy. The plaintiffs' theory was that the defendants, concrete block manufacturers, overcharged "middlemen" to whom they sold their blocks, with the middlemen then passing on the overcharge to the plaintiffs, which had not dealt with the defendant.[8] Extending the rule of *Hanover Shoe* in what is believed to be a symmetrical fashion, the Supreme Court ruled that a pass-on theory

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[8] The defendants in *Illinois Brick* manufactured concrete blocks and sold them primarily to masonry contractors. The masonry contractors, in turn, submitted bids to general contractors for the masonry portions of construction projects. The general contractors submitted bids to the plaintiffs, which were the State of Illinois and 700 other governmental entities, including counties and cities. 431 U.S. at 726.

The distributive chain in *Illinois Brick*, therefore, resembles that which often exists in the wheat industry, at least in the number of links in the distributive chain. The wheat farmers often sell to county grain elevator companies, which, in turn, sell to larger companies, which sell to the defendants. This is not always true, since, in some cases, farmers sell directly to the defendants grain companies. In other cases, farmers deal directly with farmer cooperatives. Also, the wheat sometimes is handled by only one middleman, who, in turn, deals with the defendants. As indicated, however, in many cases there are four links in the distributive chain, just as there are in the concrete block industry which was scrutinized in *Illinois Brick*.

could not be used offensively by an indirect purchases against an alleged violator of antitrust laws.[9]

From *Illinois Brick,* we learn that in an antitrust treble damage case involving price-fixing the plaintiff must have dealt directly with the alleged violator. We recognize that in *Illinois Brick* the plaintiff were buyers, whereas, in the instant cases, the plaintiffs are sellers. Such fact, however, does not render the rule of *Illinois Brick* inapplicable. In the instant case, the claim is that, because the defendants violated antitrust laws, they were able to buy wheat at depressed prices from middlemen, and that the middlemen, in turn, purchased wheat from the plaintiffs at reduced prices. In *Illinois Brick,* an indirect purchaser could not recover for an overcharge which had been passed on to him. It logically follows that an indirect seller, *i.e.,* one who did not deal with the defendant, may not recover for an undercharge set in motion by the indirect buyer's unlawful activities.

A case applying the general rule of *Illinois Brick* to a fact situation similar to the present one is In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *rehearing denied,* 616 F.2d 659 (5th Cir.), *cert. denied,*

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[9] Passing-on often means the process in which a buyer shifts all of an overcharge to the next link in the distributive chain. For example, a wholesaler who was overcharged by the manufacturer from whom he bought goods would simply add to the purchase price a certain amount to reflect mark-up for costs and profits. The resulting sum would be the price which the wholesaler would charge to the retailer to whom he sold the item. In this example, the overcharge is simply "passed on" from the wholesaler to the retailer, since it is reflected in the wholesaler's charge to his customer, the retailer.

The wheat farmers allege the coverse of the above example. *I.e.,* instead of passing on an overcharge, those in the wheat distribution chain allegedly passed on an undercharge, or an artificially low price, which was the result of an illegal conspiracy between the defendants.

Safeway Stores, Inc. v. Meat Price Investigators Assn., 101 S.Ct. 280-81 (1980). There the plaintiffs were ranchers and feeders, or both. The defendants were twenty-five retail food chains, a wholesale grocer, the retail chains' national trade association, and a beef industry price reporting publication. The plaintiffs alleged that the defendants combined to fix at artificially low levels the prices at which they purchased beef from slaughterhouses and meat packers, which in turn, caused the plaintiffs to receive less for their cattle sold to the meat packers. Although the plaintiffs did not deal directly with any defendant, it was their theory that they received less for their cattle which they sold to the slaughterhouses because of the defendants' antitrust activity.

In *Beef Industry,* as here, the plaintiffs' basic position was that *Illinois Brick* simply had no applicaiton. The Fifth Circuit rejected this argument and held that the general rule of *Illinois Brick* did not apply, and that such would bar the plaintiffs, none of whom had sold cattle to any defendant, from recovery in an antitrust action. We recognize that the Fifth Circuit went on to hold that the plaintiffs came within an exception to the *Illinois Brick* rule. However, in our view, the plaintiffs in the present case do not come within any exception to the rule. The relevance of *Beef Industry* is that the rule of *Illinois Brick* precludes an antitrust action by a seller who alleges price-fixing by a defendant with whom he has not dealt directly, unless the seller can bring himself within some exception to the general rule.

As indicated, there are exceptions to the *Hanover-Illinois Brick* rule. In *Hanover Shoe,* the Supreme Court recognized that if the plaintiff in that case, who had dealt directly with the defendant, had a pre-existing cost-plus contract with its customer, then a pass-on theory of defense might be permitted. Similarly, in *Illinois Brick,* where the plaintiffs had not dealt with the defendants, the Supreme Court again recognized that if the plaintiffs in that case

had a pre-existing cost-plus contract with the middlemen, which they did not, then the plaintiffs could have used the pass-on theory offensively, *i.e.*, they would have had a cause of action against the defendants with whom they had no direct dealings. Also, in *Illinois Brick*, the Supreme Court further recognized that the pass-on theory might be permitted "where the direct purchaser is owned or controlled by its customer."

Recognizing that the Fifth Circuit in *Beef Industry* held that the plaintiffs came within an exception to the rule of *Illinois Brick*, we do not believe the plaintiffs in the instant case have brought themselves within any such exception. In *Beef Industry*, the Fifth Circuit held that there was the "functional equivalent" to a pre-existing cost-plus contract. In thus holding, the Fifth Circuit relied on the allegation that in buying live cattle the packers strictly applied a set formula to a Yellow Sheet reflecting the defendants' wholesale beef prices. We find nothing comparable in the instant case. Be that as it may, the Supreme Court has indicated that exceptions to *Illinois Brick* are exceedingly narrow in scope, and, we believe, should be few in number. In our view, any exception should not be given an expensive application, lest it swallow the rule and become the rule itself.[10]

As indicated, in its order of June 25, 1979, the trial judge not only held that *Illinois Brick* applied to all who had not

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[10] In support of our strong belief that any exception to the rule of *Illinois Brick* should be narrow in scope, *see* Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3rd Cir. 1979). There the Third Circuit held that indirect purchasers of consumer bags could not recover treble damages from the manufacturer of the bags in the absence of proof that there were pre-existing fixed quantity, cost-plus contracts at each level of distribution between the direct purchasers from the defendant manufacturer and the plaintiffs, and that therefore the plaintiffs had absorbed the illegal overcharge in its entirety.

themselves dealt with Continental, but also refused to certify as a class those who had dealt directly with Continental. It is conceded that the question of whether those persons who sold to the defendants should have been certified as a class was a discretionary matter. Our study of the matter convinces us that the trial judge considered all relevant factors and did not abuse his discretion when he refused to certify.[11]

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[11] Fed. R. Civ. P. 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Judge Daugherty found the classes should not be recertified because, *inter alia*, the vast majority of potential class members were eliminated as plaintiffs. Therefore, the number of direct sellers was not large enough to meet the numerosity requirement. Further, he found that the test for meeting that requirement is not one of numbers alone, "but rather a determination of impracticability of joinder." *See, e.g.*, Bennett v. United States, 266 F. Supp. 627 (W.D. Okla. 1965).

More importantly, since none of the named plaintiffs sold directly to the defendants, there were no class representatives. In the Oklahoma case, there apparently was no volunteer to replace Cleveland. While there apparently were proposed new class representatives in the other two cases, the court found that the proposed substitutes had not shown "that they would make adequate financial and other commitments to the actions or that they do not suffer from any conflicts of interests." So there were no class representatives for the proposed new classes and the lower court acted properly in refusing to certify.

See also Sosna v. Iowa, 419 U.S. 393, 403 (1975); Holt v. Moore, 541 F.2d 460, 462 (4th Cir. 1976); Britt v. McKenney, 529 F.2d 44, 45 (1st Cir.), *cert. denied*, Burden v. McKenney, 429 U.S. 854 (1976).

By timely post-trial motions, the parties raised several matters, some of which apparently had not been previously urged. All were denied, and plaintiffs suggest that such action constitutes error.

Specifically, after the trial court had ruled that *Illinois Brick* applied, the plaintiffs sought leave to amend their pleadings so as to include claims based on fraud and deceit or civil conspiracy with jurisdiction based on diversity. In this regard the plaintiffs assert that such claims were, in reality, already pleaded and amendment was not actually necessary. We do not agree.

The present causes of action were clearly based only on antitrust statutes, and the request to amend the pleadings to include claims based on state law was not made until after the trial court ruled that *Illinois Brick* applied. To hold that the present complaints set forth not only claims for antitrust violations but also claims for fraud and deceit would reduce the rules of pleading to a shambles. Suffice it to say, the trial court did not abuse its discretion in refusing to allow the plaintiffs to amend their complaints so as to include additional and different claims. For seven years the matter had proceeded as an antitrust case, and it was too late to convert the present proceedings to something different. In *Beef Industry,* the Fifth Circuit also held that the trial court did not abuse its discretion in denying post-judgment motions to amend. *See also* Summit Office Park, Inc. v. United States Steel Corp., 639 F.2d 1278 (5th Cir. 1981), in which dismissal was based on *Illinois Brick* and the denial of a motion to amend was held not to constitute an abuse of discretion.

Other matters raised on appeal need not be considered in any detail. The trial court did not err in refusing to transfer the Zinser and Spearman cases back to the Northern District of Texas. This request was only made after the handwriting was on the wall. Similarly, the trial court did not err in denying plaintiffs' request for attorney fees.

Because of a recent Supreme Court decision, one final matter requires comment. As indicated, the trial judge in 1974 entered a protective order requiring the named parties and counsel to obtain court permission before contacting members of the class. We are advised that such order was in accord with the practice at that time, and that there was no objection to the entry of such an order. However, in their post-judgment motion the plaintiffs asked that the order be lifted. The trial court denied the request, and the matter is raised on appeal.

In Gulf Oil Co. v. Bernard, 49 U.S.L.W. 4604 (June 1, 1981), the Supreme Court held that an order similar to the one in the instant case was inconsistent with the general policies embodied in Fed. R. Civ. P. 23, and that any order of this type must be based on a "clear record and specific findings that reflect a weighing of the need for limitation and the potential interference with the rights of the parties." In view of *Gulf*, the protective order should not have been entered, and, upon subsequent request, should have been vacated. All of this, of course, is by way of hindsight. But to clear the record, that portion only of the trial court's judgment is reversed. In all other regards, the judgment is affirmed.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
C404 United States Courthouse
Denver, Colorado 80294

September 4, 1981

To ALL COUNSEL

Re: No. 79-2296, Zinser, et al, v. Continental Grain Company
No. 79-2310, Cleveland v. Palmby, et al

Dear Counsel:

Enclosed is a copy of an order entered in the captioned case today.

Very truly yours,

HOWARD K. PHILLIPS
Clerk

By: /s/ [Illegible]
Deputy Clerk

dvc

JULY TERM—September 4, 1981

Before Honorable Oliver Seth, Chief Judge, Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, and Honorable Stephanie K. Seymour, Circuit Judges

No. 79-2310

EDGAR CLEVELAND, individually and on behalf of each and all other persons similarly situated who were wheat farmers in the State of Oklahoma and sold wheat on the open market from May 1, 1972 to September 1, 1972,
Plaintiff-Appellant,

vs.

CLARENCE PALMBY; CONTINENTAL GRAIN COMPANY; CARGILL, INCORPORATED; LOUIS DREYFUS CORPORATION; COOK INDUSTRIES; GARNAC GRAIN COMPANY; and BUNGE CORPORATION,
Defendants-Appellees.

JOE ZINSER, *Plaintiff-Appellant,*

vs.

CONTINENTAL GRAIN COMPANY, *Defendant-Appellee,*

No. 79-2296

JOHN SPEARMAN, *Plaintiff-Appellant,*

vs.

CONTINENTAL GRAIN COMPANY, *Defendant-Appellee,*

This matter comes on for consideration of appellants' petitions for rehearing and suggestions for rehearing en banc in the captioned causes.

Upon consideration whereof, the petition for rehearing are denied by the panel to whom the cases were argued and submitted.

The petitions for rehearing have been denied by the panel to whom the cases were argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied. Circuit Judge Holloway did not participate in the en banc proceedings.

/s/ Howard K. Phillips

Howard K. Phillips, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129 (All Cases)
Civ. 72-731-D
Civ. 73-779-D
Civ. 73-780-D

IN RE: WHEAT FARMERS ANTITRUST
CLASS ACTION LITIGATION

ORDER

(Filed June 25, 1979)

This is an antitrust action in which it is asserted that the Defendant grain companies conspired to fix the price of wheat paid to wheat farmers or producers at a low level by withholding from the public information regarding the sale of wheat to the Soviet Union in the summer of 1972. Plaintiffs allege that the Defendants knew prior to the time that Plaintiffs harvested and sold their wheat that the Soviet Union would buy large quantities of wheat in the United States and that this demand for wheat would drive up the price, and that the Defendants conspired to withhold this information from the public in order to keep the price at which Defendants could purchase wheat from the farmers at a level lower than that anticipated once the announcement of the Soviet purchase was made. The Plaintiffs seek relief herein pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for losses they allegedly sustained when they sold their wheat on the open market during 1972 at a lower level than the market price should have been.

This litigation involves several cases which have been consolidated in this Court for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 relating to

multidistrict litigation. The Plaintiffs in each case purport to represent a class of wheat farmers in a particular area who sold their wheat while the information of the wheat sales to the Soviet Union was purportedly suppressed. Plaintiff Cleveland purports to represent all Oklahoma wheat farmers; Plaintiff Zinser purports to represent the wheat farmers in certain counties of Texas primarily located in the area known as the Texas panhandle; and Plaintiff Spearman purports to represent the wheat farmers in Curry County, New Mexico. The Zinser and Spearman cases have been transferred to this Court from the Northern District of Texas. The pleadings in the cases contain basically identical allegations. Plaintiff Cleveland's action is brought pursuant to Section 4 of the Clayton Act alleging injury arising from alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, by the Defendants claiming they entered into an agreement or conspiracy to fix prices. Plaintiffs Zinser and Spearman have adopted Cleveland's allegations with regard to the violations of Section 1 of the Sherman Act and have also added an allegation that Defendant Continental Grain violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in a monopoly. The only Defendants originally joined in all cases were Continental Grain Company and Clarence Palmby. Plaintiff Cleveland also joined as Defendants in his case the grain companies Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company, and Bunge Corporation.

On June 30, 1975, the Court certified the cases involved to be maintained as class actions on behalf of all wheat producers in designated areas who sold wheat on the open market from May 1, 1972 until September 1, 1972.[1]

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[1] As indicated in the Court's Order filed on June 30, 1975, the classes involved are as follows:

Cleveland—"All Oklahoma wheat farmers who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 43,000 farmers."

Zinser—"All wheat farmers in 34 designated counties in Texas

Subsequent to the certification of the cases in this action as class actions, the United States Supreme Court decided *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). In *Illinois Brick*, the Supreme Court held that indirect purchasers, whose only claim of injury is that an illegal overcharge has been passed on to them, are not persons injured by an antitrust violation [2] and cannot recover under Section 4 of the Clayton Act except in extremely limited circumstances.[3]

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located in the Texas Panhandle and adjacent areas of North Texas who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 12,000 farmers."

Spearman—"All wheat farmers in Curry County, New Mexico who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include between 600 and 1500 farmers."

[2] In *Illinois Brick*, the Supreme Court refused to overturn its 1968 ruling in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), which severely restricted the circumstances in which the pass-on of illegal overcharges may be proved. While Hanover *Shoe* dealt with the defensive use of pass-on by a defendant trying to show that the plaintiff, the first purchaser, had suffered no actual injury, *Illinois Brick* applied the same principles to bar the offensive use of pass-on by an indirect purchaser seeking to establish that it, and not the first purchaser, was the party harmed. The Supreme Court thus rejected the offensive, as well as the defensive, use of the pass-on theory. *See generally*, Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Columbia L. Rev. 979, 998 (1977).

[3] The Supreme Court in *Illinois Brick* noted the exception recognized in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp., supra*, "that there might be situations—for instance, when an overcharged buyer has a pre-existing, 'cost-plus' contract, thus making it easy to prove that he has not been damaged—where the considerations requiring that the passing-on defense not be permitted in this case would not be present." *Hanover Shoe*, 392 U.S.

Upon study of the *Illinois Brick* decision, the Court tentatively concluded that the ruling in that case was applicable to this litigation. In a letter dated March 16, 1978, the Court informed the parties in this action that it appeared that the ruling in *Illinois Brick* suggested that a reconsideration of the certified classes in this litigation might be necessary and directed the plaintiff class representatives to file a statement with reference to whether their respective classes contained any direct sellers of wheat to a defendant grain company and the approximate number of such direct sellers in each class. The Court indicated that where there existed a viable class in a case and the present plaintiff class representative was not a member of the viable class, a substitution of the plaintiff class representative would appear to be appropriate and necessary.

An examination of the record reveals that none of the original plaintiff class representatives herein sold their wheat directly to the defendant grain companies during the time period involved in this action. By letter dated March 22, 1978, counsel in the Zinser case indicated that they expected to substitute Jack Williams as the plaintiff class representative in that case. By letter dated March 28, 1978, counsel in the Spearman case indicated that T. M. Bordon might be substituted as the plaintiff class representative in that case. A substitute class representative has not been named and presented for the Cleveland case.

In a letter dated May 26, 1978, counsel for Continental Grain indicated that Continental Grain's records revealed that there were 62 members of the class in the Spearman

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at 494. *See Illinois Brick*, 431 U.S. at 735-36. It is also mentioned in *Illinois Brick* that "[a]nother situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Id.*, 431 U.S. at 736 n. 16.

case who sold wheat directly to Continental Grain; that not more than 212 members of the class in the Zinser case sold their wheat directly to Continental Grain; and that not more than 92 members of the class in the Cleveland case sold their wheat directly to Continental Grain.

On August 23, 1978, Plaintiffs Zinser and Spearman filed a Motion to Extend Time for Discovery in Determining All Members of the Class Who Sold Direct to Continental Grain Company Through the Member Farmer Cooperatives and to Determine a Correct List of the Parties Under the Court's Order. Plaintiff Cleveland has not joined in this motion. In connection with said motion, Defendant Continental Grain and Plaintiffs Zinser and Spearman have filed several letters, briefs and exhibits in support of their respective contentions.

In their motion, Zinser and Spearman first move the Court for permission to make and include as members of the class of farmers who sold wheat directly to Continental Grain the farmer cooperatives who handled the farmers' wheat during the relevant time period. In the alternative, they move the Court for the right to ascertain from the farmer cooperatives the names of the individual farmers who sold their grain to Continental Grain through farmer cooperatives. Zinser and Spearman contend that wheat farmers who sold their wheat to a defendant grain company through a farmer cooperative should be considered as direct sellers to the grain companies so as to fall within the rule in *Illinois Brick* and that the farmer cooperatives, as the representatives and sellers of grain for the farmers, should be made members of the classes in this action, representing those farmers who owned the cooperatives and for whom they acted to sell wheat directly to the defendant grain companies.

The Court concludes that Zinser and Spearman's motion should be overruled. To the extent said motion requests an

extension of time for additional discovery, the Court has already permitted such an extension. As Continental Grain has indicated those class members who sold wheat directly to it, there is no need for a further extension of time for additional discovery. Plaintiffs' request for the Court to consider the class members who sold wheat to a defendant grain company through a farmer cooperative to be direct sellers to the defendant grain companies is denied. Such a situation does not come within the narrow exceptions set forth in *Illinois Brick*. The Plaintiffs have not shown that there were pre-existing, fixed-quantity, cost-plus contracts at each level of distribution between the Defendants and the members of the classes herein. Nor have they shown that the entities to whom the wheat farmers directly sold their wheat were owned or controlled by the defendant grain companies. As an incorporated farmer cooperative is a legal entity separate and apart from its members, *see* 18 Am.Jur.2d *Cooperative Associations* § 3 (1965), a wheat farmer who sells wheat to a cooperative which in turn sells the wheat to a grain company is an indirect seller of the wheat to the grain company and is precluded by the ruling in *Illinois Brick* from having a remedy under § 4 of the Clayton Act. Plaintiffs' request that the Court make the farmer cooperatives who sold wheat directly to a defendant grain company a new class in this action is also denied. No cooperatives are named as members of the certified classes in this action nor have any cooperatives sought to intervene herein. Moreover, as any antitust claims a farmer cooperative might have against the defendant grain companies arising out of the time period involved in this action may possibly be barred by the four-year antitrust statute of limitations, it would be inappropraite for the Court to add the cooperatives as members of the classes in this case.

Plaintiffs have on several occasions urged the Court to defer resolution of the application of *Illinois Brick* to this action pending possible legislative action to override *Illi-*

nois Brick. It has now been over two years since the Supreme Court rendered its decision in *Illinois Brick*, yet no legislation has been enacted to override that decision. Given the present uncertain status of any such legislative efforts, the Court finds no basis for a further delay in determining the applicability of *Illinois Brick* to this litigation. *Illinois Brick* remains the law and, if appropriate, must be applied in this case.

The Court has conducted a hearing on the possible recertification of the classes in this action in light of *Illinois Brick*. Upon consideration of the arguments made by the parties at that hearing and in their various briefs relating to the matter, the Court concludes that the ruling in *Illinois Brick* is applicable to this litigation. In view of the ruling of the United States District Court for the Northern District of Texas in *In re Beef Industry Antitrust Litigation*, M.D.L. 248 (N.D. Tex., Dec. 9, 1977), where the *Illinois Brick* rule was applied in an antitrust case involving plaintiffs who were indirect sellers, the Court determines that the ruling in *Illinois Brick* bars recovery under Section 4 of the Clayton Act by an indirect seller as well as by an indirect purchaser.

Accordingly, in light of *Illinios Brick*, the Court must dismiss from the classes certified in these actions those class members who did not sell wheat directly to any of the defendant grain companies during the time period involved herein.

With regard to the recertification of the classes, Continental Grain contends that the remaining classes consisting of farmers who were direct sellers to a defendant grain company should not be recertified as they no longer meet the adequacy of representation or numerosity prerequisites for maintenance of a class action pursuant to Rule 23(a), Federal Rules of Civil Procedure. It maintains that the Cleveland case should be dismissed because of the lack of a class representative, as Cleveland is not a direct seller

and no class member who was a direct seller has stepped forward as a proposed class representative in that case, and that the Zinser and Spearman cases should not be recertified as neither Zinser nor Spearman were direct sellers and that the proposed new class representatives in those cases are inadequate as they have not demonstrated that they would make adequate financial and other commitments to the actions or that they do not suffer from any conflicts of interest. Continental Grain further contends that the remaining potential classes should not be recertified as the number of direct sellers in these cases is not so large as to meet the numerosity requirement of Rule 23(a)(1), Federal Rules of Civil Procedure.

As the Court has concluded that those members of the classes involved in this action who did not sell their wheat directly to the defendant grain companies are to be excluded from the classes herein pursuant to the ruling in *Illinois Brick*, this will leave all three cases involved herein without a class representative. The information provided by Continental Grain indicates that during the time period in question it purchased wheat directly from 62 class members in the Spearman case, not more than 212 class members in the Zinser case, and not more than 92 members of the class in the Cleveland case. There is no indication in the record as to the number of class members in the Cleveland case who sold their wheat directly to a defendant grain company other than Continental Grain.

In view of the effect of the ruling in *Illinois Brick* upon the size of the classes involved in this litigation, the Court has reevaluated the propriety of giving this litigation class action treatment.

As one of the prerequisites for maintaining a class action, subdivision (1) of Rule 23(a), Federal Rules of Civil Procedure, permits a class action only when "the class is so numerous that joinder of all members is impracticable." Although the number of class members is relevant, the

language of the rule as construed emphasizes that this criterion is not a "numerousness test," but rather a determination of impracticability of joinder. 4 Newberg *Class Actions* § 7512, at 9 (1977). The determination of practicability depends on all the circumstances surrounding the case, *Rex* v. *Owens ex rel. State of Oklahoma*, 585 F.2d 432, 436 (Tenth Cir. 1978), including the magnitude of claims and the degree of dispersion of the prospective plaintiffs. *Harriss* v. *Pan American World Airways, Inc.*, 74 F.R.D. 24, 45 (N.D. Cal. 1977).

In the present status of the case, the Court in its discretion finds that the cases involved in this litigation should not be maintained as class actions as it has not been sufficiently shown to the Court that the joinder or intervention of all who might be expected to join will be impracticable. Upon consideration of the limited geographic areas involved in each case, the short duration of the alleged conspiracy, the identity of the persons allegedly coerced, the level of distribution affected by the alleged conspiracy, and the product involved, the Court concludes that the cases involved herein are no longer in such a posture as to warrant class action treatment.

The number of potential class members in each of the three cases is not so numerous as to make joinder impracticable or to make a class action any more likely to promote uniformity of decision than joinder. *See, e.g., Barcelo* v. *Brown*, 78 F.R.D. 531, 535 (D. P.R. 1978) (class action certification unnecessary where there were approximately 150 potential class members); *Aiello* v. *City of Wilmington, Del.*, 426 F.Supp. 1272, 1282-83 (D. Del. 1976) (250 potential class members are not so numerous as to make joinder impracticable); *United Steelworkers of America, Local 8024* v. *Jarl Extrusions, Inc.*, 405 F.Supp. 302, 303 (E.D. Tenn. 1975), *aff'd*, 527 F.2d 648 (Sixth Cir. 1975) (joinder of 85 potential class members practicable); *Van Allen* v. *Circle K Corp.*, 58 F.R.D. 562, 564 (C.D. Cal. 1972) (149

potential class members would not create an unmanageable piece of litigation); *Minersville Coal Co.* v. *Anthracite Export Ass'n*, 55 F.R.D. 426, 428 (M.D. Pa. 1971) (330 potential class members are not so numerous as to make joinder impracticable); *City & County of Denver* v. *American Oil Co.*, 53 F. R. D. 620, 626 (D. Colo. 1971) (joinder of 126 potential class members practicable. *Utah* v. *American Pipe & Construction Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969) (joinder of 350 plaintiffs practicable); *Bennett* v. *United States*, 266 F.Supp. 627, 629 (W.D. Okla. 1965) (potential claims of all resident and property owners in Oklahoma City not so numerous as to require a class action).

In addition, the geographic distribution of the direct sellers involved in each case, in that all such farmers in each case reside in the same general geographic area, is a factor weighing in favor of the practicability of joinder. *See DeMarco* v. *Edens*, 390 F.2d 836, 845 (Second Cir. 1968); *Ewh* v. *Monarch Wine Co.*, 73 F.R.D. 131, 133 (E.D. N.Y. 1977); *Carr* v. *New York Stock Exchange, Inc.*, 414 F.Supp. 1292, 1304 (N.D. Cal. 1976).

In view of the foregoing, the Court is unable to conclude that class actions in the cases involved in this litigation, in their present posture, would achieve economies of time, effort and expenses or promote any more uniformity of decision than the use of joinder and intervention. *See* Notes of the Advisory Committee, 39 F.R.D. 73, 102-103 (1966).

Accordingly, Zinser and Spearman's Motion to Extend Time for Discovery in Determining All Members of the Class Who Sold Direct to Continental Grain Company Through the Member Farmer Cooperatives and to Determine a Correct List of the Parties Under the Court's Order is overruled in all aspects. And as the present Plaintiffs are barred from recovering herein by *Illinois Brick*, this

action, to include all cases therein, is hereby dismissed without prejudice.[4]

It is so ordered this 25th day of June, 1979.

/s/ FRED DAUGHERTY
Fred Daugherty
United States District Judge

JUDGMENT ENTERED ON JUNE 25, 1979

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[4] Though the Court cannot make a ruling on the same, it would appear that the antitrust statute of limitations was tolled for the benefit of the class members during the period that the class actions involved in this litigation were certified. *See generally, Flanagan v. McDonnell Douglas Corp.*, 428 F.Supp. 770, 775 (C.D. Cal. 1977); 1 Newberg *Class Actions* § 1010.1o (1977).

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129 (All Cases)
IN RE: WHEAT FARMERS ANTITRUST

CLASS ACTION LITIGATION

ORDER

(Filed November 13, 1979)

This is an antitrust action in which it is asserted that the Defendant grain companies conspired to fix the price of wheat paid to wheat farmers or producers at a low level by withholding from the public information regarding the sale of wheat to the Soviet Union in the summer of 1972. Plaintiffs allege that the Defendants knew prior to the time that Plaintiffs harvested and sold their wheat that the Soviet Union would buy large quantities of wheat in the United States and that this demand for wheat would drive up the price, and that the Defendants conspired to withhold this information from the public in order to keep the price at which Defendants could purchase wheat from the farmers at a level lower than that anticipated once the announcement of the Soviet purchase was made. In their pleadings, the Plaintiffs seek relief herein pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, for losses they allegedly sustained when they sold their wheat on the open market during 1972 at a lower level than the market price should have been.

This litigation involves several cases which have been consolidated in this Court for coordinated and consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407 relating to multidistrict litigation. The Plaintiffs in each case purport to represent a class of wheat farmers in a particular area who sold their wheat while the information of the

wheat sales to the Soviet Union was purportedly suppressed. Plaintiff Cleveland purports to represent all Oklahoma wheat farmers; Plaintiff Zinser purports to represent the wheat farmers in certain counties of Texas primarily located in the area known as the Texas panhandle; and Plaintiff Spearman purports to represent the wheat farmers in Curry County, New Mexico. The Zinser and Spearman cases have been transferred for pretrial proceedings to this Court from the Northern District of Texas. The pleadings in the cases contain basically identical allegations. Plaintiff Cleveland's action is brought pursuant to Section 4 of the Clayton Act alleging injury arising from alleged violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, by the Defendants claiming they entered into an agreement or conspiracy to fix prices. Plaintiffs Zinser and Speaman have adopted Cleveland's allegations with regard to the violations of Section 1 of the Sherman Act and have also added an allegation that Defendant Continental Grain violated Section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in a monopoly. The only Defendants originally joined in all cases were Continental Grain Company and Clarence Palmby. Plaintiff Cleveland also joined as Defendants in his case the grain companies Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company and Bunge Corporation.

On June 20, 1975, the Court certified the cases involved to be maintained as class action on behalf of all wheat producers in designated areas who sold wheat on the open market from May 1, 1972 until September 1, 1972.[1]

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[1] As indicated in the Court's order filed on June 30, 1975, the classes involved are as follows:

Cleveland—"All Oklahoma wheat farmers who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 43,000 farmers."

Zinser—"All wheat farmers in 34 designated counties in

On June 25, 1979, the Court entered an Order wherein it found that *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed2d 707 (1977), was applicable to the instant action, and that the ruling in *Illinois Brick* thus barred recovery under Section 4 of the Clayton Act by the members in the classes in this action who did not sell their wheat directly to any of the defendant grain companies during the pertinent time period. In addition, in view of the effect of the application of the *Illinois Brick* ruling upon the size of the classes involved in this litigation, the Court reconsidered the certification of those classes involved in this litigation, the Court reconsidered the certification of those classes and concluded that the cases involved in this action should not be maintained as class actions as it had not been sufficiently shown that the classes involved were so numerous that joinder of all members was impracticable. On this basis, the Court dismissed this action without prejudice.

The action is now before the Court on various motions by the parties. The Court rules on these motions as follows:

Plaintiffs' Motions

All Plaintiffs have filed multiple motions [2] wherein they seek to have the Court set aside or amend its Order of June

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Texas located in the Texas Panhandle and adjacent areas of North Texas who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include 12,000 farmers."

Spearman—"All wheat farmers in Curry County, New Mexico who sold wheat on the open market from May 1, 1972 until September 1, 1972. This class is estimated to include between 600 and 1500 farmers."

[2] Plaintiff Cleveland has filed a Motion for New Trial, Motion to Vacate Judgment or Amend Judgment, Motion to Amend and a Motion for Oral Argument. Plaintiffs Zinser and Spearman have

25, 1979. The Defendants have responded to these motions and the parties have filed briefs, affidavits and letters in support of their respective contentions.

In their motions, Plaintiffs first move the Court to set aside its Order of June 26, 1979, on the ground that said Order was contrary to the law as the application of *Illinois Brick* to this case was improper. They contend that *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573 (Third Cir. 1979), and *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (Fifth Cir. 1979), establish that *Illinois Brick* does not apply in this case.

The Defendants contend that the Plaintiffs' instant motion should be denied as the Court has already thoroughly considered the application of *Illinois Brick* to this case.

Upon examination of the Plaintiffs' motions and briefs, and the aforementioned decisions, the Court is not persuaded to alter its decision that the ruling in *Illinois Brick* is applicable to this case.

As noted by the Defendants in their response to Plaintiffs' present motions, the Third Circuit decision in *Mid-West Paper Products Co. v. Continental Group, Inc., supra,* was brought to this Court's attention prior to the Court's Order of June 25, 1979. Upon its initial examination of the *Mid-West Paper Products Co.* decision, the Court concluded that it did not support the Plaintiffs' argument that *Illinois Brick was* inapplicable to this case. A further examination of that case has not persuaded the Court otherwise.

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filed Plaintiffs' Motion Under Rule 59(e) of the Federal Rules of Civil Procedure to Alter or Amend the Court's Order of June 25, 1979 and Plaintiffs' Supplemental Motion Under Rule 59 of the Federal Rules of Civil Procedure for New Trial and To Alter or Amend the Court's Order of June 25, 1979. All of the Plaintiffs indicate that they adopt all of the motions filed by the other Plaintiffs. In view of this, the Court will treat each motion as having been made by all Plaintiffs.

Nor does the Fifth Court's decision in *In re Beef Industry Antitrust Litigation, supra,* control this case. In its June 25, 1979, Order, this Court referred to the ruling of the United States District Court for the Northern District of Texas in *In re Beef Industry Antitrust Litigation,* M.D.L. 248 (N.D. Tex., Dec. 9, 1977), as supporting the Court's determination that the ruling in *Illinois Brick* barred recovery under Section 4 of the Clayton Act by an indirect seller as well as by an indirect purchaser. Although the district court's order dismissing the actions in the *In re Beef Industry Antitrust Litigation* was reversed by the Fifth Circuit on the basis that the plaintiffs' complaints therein stated claims for damages within the "cost-plus" exception to the *Illinois Brick* ruling, the Fifth Circuit agreed with the district court that *Illinois Brick* applies to price-fixing suits brought by sellers against indirect purchasers. *See* 600 F.2d at 1158-59. The Fifth Circuit's decision in *In re Beef Industry Antitrust Litigation* that that action comes within an exception to *Illinois Brick* does not govern this case as, unlike *In re Beef Industry Antitrust Litigation,* the Plaintiffs' pleadings in this action do not allege facts that can bring this case within the "cost-plus" exception to the *Illinois Brick* rule. When the Plaintiffs raised this argument prior to the Court's Order of June 25, 1979, the Court permitted the Plaintiffs to attempt to establish the existence of any "cost-plus" contracts. Plaintiffs failed at that time to show the Court that such contracts existed in this case and have not persuaded the Court otherwise in their pending motions.

Accordingly, Plaintiffs' motions to have the Court's June 25, 1979, Order set aside on the basis that the ruling in *Illinois Brick* does not apply to this case are denied.

Plaintiffs next move the Court to permit them to amend their pleadings to name their cause of action as one for either the common law tort of fraud and deceit or statutory fraud and deceit under Oklahoma law (Plaintiff Cleveland) or civil conspiracy (Plaintiffs Zinser and Spearman).

They assert that they have pleaded the requisite elements for those causes of action, and that this Court has authority at this time to permit Plaintiffs to amend their pleadings as requested pursuant to Rule 15(a), Federal Rules of Civil Procedure. They further contend that the Defendants herein cannot be prejudiced by the Court's permitting the Plaintiffs to amend as the transactions alleged in their pleadings as giving rise to their allegations of antitrust violations are the identical transactions and facts giving rise to their actions for fraud and deceit or civil conspiracy; that there has been no bad faith or unreasonable delay in their request to amend as they were not appraised of the remedy in question until only a few days before the Court's Order of June 25, 1979; and that under the facts pleaded by the Plaintiffs, the Court itself should have recognized that if the Plaintiffs were not entitled to the antitrust damages sought, they were entitled to some relief.

The Defendants urge the Court to overrule Plaintiffs' instant motions on the basis that the proposed amendments raise substantial new issues of law, fact and jurisdiction which were never previously part of this case and which would generate new motions, require new discovery, and set this case back to its beginnings. Defendants assert that the cases in this action have been antitrust cases since their inception, in that the Plaintiffs' pleadings invoked only the antitrust laws, the class discovery involved only antitrust issues, the classes were certified on the basis of the antitrust laws, and that all discovery, motions and arguments involved only the antitrust laws; that the proposed amendments would require starting from scratch and would involve new motions to the Plaintiffs' pleadings, as amended, and the reexamination of the class issues; that the requested amendment would severely prejudice the Defendants, who have been put to the heavy burden and expense of litigating this action once and should not be forced to do so again; and that the proposed amendments will be futile as Zinser and Spearman's amendment does not state

a claim upon which relief can be granted. Defendants further contend that the Plaintiffs should be denied leave to amend as this action has been fully litigated for seven years; final judgment has been entered; the facts underlying the Plaintiffs' new claims were known to the Plaintiffs at the outset of the action; the law allegedly underlying those claims has existed since the outset of the action; Plaintiffs have shown no basis for the lengthy delay between the commencement of this action and Plaintiffs' proposed amendment; and Plaintiffs have not met their heavy burden to justify the delay.

The Court finds that the Plaintiffs' motions to amend should be denied. In this litigation, judgment in favor of the Defendants was entered on June 25, 7979. Under these circumstances, an amendment to the Plaintiffs' pleadings cannot be allowed until the June 25, 1979 judgment is set aside or vacated under Rules 59 or 60, Federal Rules of Civil Procedure. 6 Wright & Miller, *Federal Practice and Procedure:* Civil § 1489, at 445 (1971), and the cases cited therein. Wright & Miller sets out the rationale for this rule as follows:

> Although Rule 15(a) vests the district judge with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when "justice so requires," there is a question concerning the extent of this power once a judgment has been entered or an appeal has been taken. Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or 60. The party may move to alter or amend the judgment within ten days after its entry under Rule 59(e) or, if the motion is made after that ten day period has expired, it must be made under the provision in Rule 60 (b) for relief from a judgment or order. This approach appears sound. To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed

> in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation. Furthermore, the draftsmen of the rules included Rules 59(e) and 60(b) specifically to provide a mechanism for those situations in which relief must be obtained after judgment and the broad amendment policy of Rule 15(a) should not be construed in a manner that would render those provisions meaningless. (Footnotes omitted.)

As the Court has already indicated in this Order, the Plaintiffs have not shown the Court that the judgment entered herein on June 25, 1979 should be vacated or set aside. The Court is thus without authority at this time to allow the Plaintiffs to amend their pleadings to change the theory on which their actions are based.

Moreover, even if the Plaintiffs' motions to amend could be considered at this stage of the litigation, the same should be denied. Where almost seven years have elapsed since the commencement of the cases involved in this litigation, and the proposed amendments would change substantially the gist of the proceedings, the Court finds that justice would not be promoted by the proposed amendments. *See, e.g., Doe v. McMillan,* 566 F.2d 713, 720 (D.C.Cir. 1977), *cert. denied,* 435 U.S. 969, 98 S.Ct. 1607, 56 L.Ed2d 59 (1978). As the *Illinois Brick* ruling was issued in June, 1977, and the Court did not enter its Order dismissing this action until June, 1979, the Plaintiffs had more than a reasonable opportunity since the *Illinois Brick* ruling to amend their pleadings. While Rule 15(a), Federal Rules of Civil Procedure, requires that leave to amend is to be freely granted "when justice so requires," the United States Supreme Court has said that motions to amend may properly be denied when there has been undue delay in moving for leave to amend. *Foman v. Davis,* 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). In this case, the Plaintiffs' motions indicate that the proposed amendments are not

based on facts and evidence unearthed during the discovery process but that the same were known to the Plaintiffs at the time their cases were commenced. Since the commencement of the cases involved herein in 1972 and 1973,[3] the Plaintiffs have proceeded in this litigation solely on the theory that the Defendants have violated the antitrust laws, and the parties have completed discovery solely focusing on the alleged antitrust violations. The Plaintiffs offer no credible explanation for their failure to move for leave to amend their pleadings until almost seven years have passed since the commencement of this litigation and over two years after the *Illinois Brick* decision and nearly 18 months after the Defendants moved for dismissal on the basis of *Illinois Brick*. Absent any explanation for such an undue delay, and in view of the prejudice to Defendants that the Plaintiffs' delay in seeking the requested amendments would cause, the Court finds that the interests of fairness and justice to both parties are best served at this stage of the litigation by avoiding the additional discovery and trial preparation which the Plaintiffs' proposed amendments would require. The additional theories which the Plaintiffs seek to include by their amendments do not represent new areas of the law that could not have been developed further and incorporated into this litigation at an earlier date. While leave to amend is to be given freely, this does not mean that it can go on indefinitely. *DeBry v. Transamerica Corp.*, 601 F.2d 480, 492 (Tenth Cir. 1979).

Accordingly, Plaintiffs' motions to amend are denied. *See generally, In re Beef Industry Antitrust Litigation, supra,* 600 F.2d at 1161-1163.

Pursuant to Rule 59(e), Federal Rules of Civil Procedure, Plaintiffs next move the Court to alter or amend

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[3] Plaintiff Cleveland's Complaint in Case No. CIV-72-731-D was filed on October 24, 1972. Plaintiff Zinser's original Complaint in Case No. CIV-73-779-D was filed on November 16, 1972. Plaintiff Spearman's original Complaint in Case No. CIV-73-780-D was filed on January 2, 1973.

its Order of June 25, 1979, and permit them to show their costs and reasonable attorneys' fees, which Plaintiffs contend they should be permitted to recover "in right, justice and equity." In this connection, Plaintiffs submit that

> *Illinois Brick* was not the law when these cases were filed and that plaintiffs have been successful in establishing a class which has been found and determined by this Court to exist, and plaintiffs have taken depositions and made discovery which have been filed with this Court which shows the liability of the defendant and certainly makes a jury question. The Court certified that cases involved to be maintained as a class action on June 30, 1975, after class discovery, and prior to the *Illinois Brick* case in 1977, plaintiffs had made complete discovery and stood ready for trial, and except for *Illinois Brick* and the Court's consideration thereof, the causes could have or would have proceeded to trial before this date, and in right, justice and equity, plaintiffs are entitled to their costs and reasonable attorneys' fees.

Defendants respond that there is no basis for an award of fees to the Plaintiffs' counsel.

The Court agrees with the Defendants. Under the American Rule, attorney fees are not ordinarily recoverable in the absence of a statute or an enforceable contract. *E.g., Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 415, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In their motions, the Plaintiffs have not cited any statutory authority for them to be awarded their attorney fees under the circumstances of this action. Although Section 4 * of the Clayton Act indicates that "the

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* The full text of this section, 15 U.S.C. § 15, is as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may

cost of suit, including a reasonable attorney's fee" can be awarded in an antitrust suit, an award of attorneys' fees under this section can be made only as incident to the successful prosecution of a law action for recovery of damages based on a violation of the antitrust laws. *Detroit v. Grinnell Corp.*, 495 F.2d 448, 459 (Second Cir. 1974); *Byram Concretanks, Inc. v. Warren Concrete Products Co.*, 374 F.2d 649, 651 (Third Cir. 1967); *see* Annot., Allowance of Attorneys' Fees Under § 4 of Clayton Act (15 USCS § 15), Authorizing Award of "Reasonable Attorney's Fee" as Part of Costs Recoverable in Private Antitrust Treble-damage Suit, 21 A.L.R.Fed. 750 (1974), and the cases cited therein in §§ 5 and 6. In view of the Court's Order of June 25, 1979, the Plaintiffs have not been successful in this action and thus are not entitled to recover attorneys' fees under Section 4 of the Clayton Act.

The Plaintiffs have not established any enforceable contract whereby they are entitled to recover their attorney fees.

Nor have they shown that they come within any of the exceptions to the American Rule. Although Rule 23, Federal Rules of Civil Procedure, does not make any reference to the power of the Court to award attorney's fees in a class action and the usual rule is that they are not taxable costs, the Court has discretion to order appropriate reimbursement to the successful representatives in a class suit on the basis that the class action device is a creature of equity and the allowance of attorney-related costs is considered part of the historic equity power of the federal courts. 7A Wright & Miller, *Federal Practice and Procedure:* Civil § 1803, at 284-285 (1972). As the Plaintiffs

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sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

have been unsuccessful in this litigation, there has not been a common benefit achieved here to justify an allowance under that exception to the American Rule. *See Gottesman v. General Motors Corp., supra.*

Accordingly, Plaintiffs' motions for the Court to alter or amend its June 25, 1979, Order to allow them their costs and attorney fees are denied.

Plaintiffs Zinser and Spearman next move the Court to vacate its Order of June 25, 1979 and transfer their cases to the United States District Court for the Northern District of Texas, Amarillo Division, with the Court's advice as to the disposition to be made of the cases. Said Plaintiffs provide no authority for such a motion but assert that as these cases were originally filed in the Northern District of Texas, the law applicable to these cases on appeal is the law of the Fifth Circuit and the cases should thus be appealed to the Fifth Circuit. They assert in their supporting brief that "the court of original jurisdiction within the Fifth Circuit appellate district, where local discovery should be had, should be the court to make a final determination in this case, and that the ends of justice would be best served by the granting of this motion."

Defendants respond that the instant motion to transfer is frivolous. They contend that this action cannot be transferred to any other federal district court as final judgment has been entered and there is nothing left to transfer on the district court level. Defendants submit that what Plaintiffs Zinser and Spearman are seeking is a transfer to the Fifth Circuit for purposes of appeal, and state that such a request was rejected in *Utah v. American Pipe & Construction Co.*, 316 F.Supp. 837 (C.D.Cal. 1970).

Plaintiffs Zinser and Spearman's motion to return their cases to the Northern District of Texas for purposes of appeal is denied as only the United States Court of Appeals for the Tenth Circuit has the authority to review the decision of this Court in the instant litigation. *See Utah v.*

American Pipe & Construction Co., supra; Weigel, *The Judicial Panel on Multidistrict Litigation, Transferor Courts and Transferee Courts,* 78 F.R.D. 575, 578 (1978).

Plaintiffs next move the Court to reconsider its decision in the Order of June 25, 1979, that the direct sellers in this action do not themselves constitute a sufficient class. They request a hearing wherein they would be permitted to show the Court that a class should be established comprised of the direct sellers to the Defendants. They state that motions were filed in the *Cleveland* (should be *Zinser*) and *Spearman* cases in the federal district court for the Northern District of Texas to consolidate both cases for trial; that these motions are still pending in that court; and that if this Court does not find it proper to permit the Plaintiffs herein to introduce evidence concerning the establishment of a class, it should at lease revise its Order of June 25, 1979, and "transfer that portion of the original case which involves the direct sellers to Continental back to the court where both cases were originally filed and permit the court for the Northern District of Texas to pass upon this phase of the case."

Defendants contend that the Plaintiffs' effort to reargue the numerosity issue should be rejected as the Plaintiffs have cited no authority for such a reconsideration.

Plaintiffs' motions for the Court to reconsider its decision that the cases involved herein should not be maintained as class actions should be denied. After a hearing on the matter, the Court fully considered the propriety of giving this litigation class action treatment, and in its Order of June 25, 1979, determined that it has not been sufficiently shown that the joinder or intervention of all of the direct sellers involved in this action would be impracticable. Plaintiffs' instant motions have not persuaded the Court that such a determination was incorrect.

Accordingly, Plaintiffs' motions for the Court to reconsider its decision that the direct sellers in this action are

not sufficient to constitute a class are denied. Plaintiffs' motions are also denied to the extent they request a hearing on this matter and the transfer of their cases to the Northern District of Texas.

Plaintiffs next move the Court to reconsider its Order of June 25, 1979, and to alter or amend such Order on the basis that, as argued by Plaintiffs' Zinser and Spearman, "[t]he affidavits of independent grain dealers selling farmers' grain to Continental Grain Company, on file in this proceeding, show that such independent grain dealers were controlled in prices by Continental Grain Company, and being controlled by Continental Grain Company and the prices it fixed for grain sold to Continental is an outright exception to *Illinois Brick*.

Defendants respond that the Court has already considered this issue and that there is no need for it to now reconsider the matter.

Plaintiffs' instant motions should be denied. The Court has already fully considered whether this litigation comes within the narrow exceptions set forth in *Illinois Brick* and, in its Order of June 25, 1979, has concluded that this action does not fall within such exceptions. Plaintiffs' instant motions do not persuade the Court that such a determination was erroneous.

Accordingly, Plaintiffs' motions for the Court to reconsider its June 25, 1979, Order with regard to the application to this case of the exception mentioned in *Illinois Brick* "where the direct purchaser is owned or controlled by its customer," *see* 431 U.S. at 736 n. 16, are denied.

Plaintiffs further move the Court pursuant to Rule 59, Federal Rules of Civil Procedure, to withdraw its June 25, 1979 Order "in order to consider the matter of permitting plaintiffs and plaintiffs' attorneys to communicate with the plaintiffs as members of the original class, or, if it is the opinion of the Court that since the Order of June 25, 1979,

has been entered, that the named plaintiffs and plaintiffs' attorneys are not further bound by the rule concerning communication with members of the class, then that the Court so specify or advise." Plaintiffs contend that they owe a duty and obligation to the members of the class to discuss the case with them and to inform them of the Court's action, their rights as far as appeal is concerned, and the filing of independent suits, and assert that they cannot discharge this duty and obligation without them being permitted to communicate with such class members, and that any such "gag" order is an infringement upon their First Amendment rights and on undue restraint upon the rights, duties and obligations of Plaintiffs' counsel. Plaintiffs state that in imposing the protective order in this case, the Court simply maintained the local court rule of the United States District Courts of the Northern District of Texas, which local court rule the Plaintiffs state has been rescinded. Plaintiffs urge this Court "to certainly repeal the rule as it applies to the wheat cases at this time, and particularly in light of the action of the court where the cases were originally filed."

Defendants respond that the Plaintiffs' instant motion should be denied as it is untimely, in that it was not made within the 10-day time period set forth in Rule 59(e); that the Plaintiffs are apparently seeking to be released from the Court's order regulating class communications in order to solicit the representation of former class members in potential new actions and that such solicitation is expressly prohibited by the Court's order as well as by the recommendations of the Manual for Complex Litigation, and is ethically improper; that the Plaintiffs' argument that the Court's order regulating class communications should be vacated because the local court rule for the federal district courts in the Northern District of Texas has been revoked is without merit, in that the Court's order was based not on the local court rule in the Northern District of Texas but the rule and sample order contained in the Manual for

Complex Litigation; and that the Court's judgment entered herein on June 25, 1979, does not relieve the Plaintiffs or their counsel of their obligation not to engage in improper communications with former class members as said judgment does not affect counsel's basic ethical obligation not to solicit clients nor the obligations of Plaintiffs and their counsel under the Court's Order of January 4, 1974, as the potential for abuse in this litigation is still present.

As these actions have not been finally closed, as appeals are possible and seem likely, the Court is aware of no reason why the principles underlying the protective order of January 4, 1974, should not continue to be applicable to finality of this litigation.

In view of the foregoing, all of the Plaintiffs' motions are denied. As the Court is able to fully consider and rule on said motions upon the motions and Defendants' responses thereto, and the parties' briefs and letters in support thereof, the Court finds that it is not necessary for it to conduct oral arguments on said motions. Plaintiffs' Motions for Oral Argument are thus denied.

Defendants' Motion to Correct and Clarify the Court's Order and Judgment of June 25, 1979.

Pursuant to Rules 59(e) and 60(a), Federal Rules of Civil Procedure, the Defendants move the Court to correct and clarify its Order and Judgment of June 25, 1979, to provide clearly that the claims of all members of the classes involved in this litigation who did not sell wheat directly to any Defendant during the applicable time period are dismissed with prejudice and that the claims of all members of the classes who sold wheat directly to any Defendant during the applicable time period are dismissed without prejudice.

Plaintiffs respond that the Court should not amend its Order as requested by the Defendants on the basis that it

"would be unjust and inequitable, under the facts of this case, to dismiss Plaintiffs' course of action with prejudice, as such action could deprive Plaintiffs of their rights to refile and could have the effect of failing to toll the statute of limitations." Plaintiffs contend that their pleadings in the cases involved in this litigation are broad enough to allege common law torts are well as antitrust violations, and that any dismissal of their antitrust actions should be without prejudice to their right to amend their pleadings or to refile their actions so as to allege their common law torts.

Upon consideration of the Defendants' Motion to Correct and Clarify the Court's Order and Judgment of June 25, 1979, the Court finds that said Motion should be granted. Accordingly, the Court's Order and Judgment entered herein on June 25, 1979, should be amended to show that the claims of all members of the classes involved in this litigation who did not sell wheat directly to any of the Defendants during the applicable period of time are dismissed with prejudice, and the claims of all members of the classes who did sell wheat directly to any of the Defendants during the applicable period are dismissed without prejudice.

It is so ordered this 13th day of November, 1979.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129 (All Cases)
Civ. 72-731-D
Civ. 73-779-D
Civ. 73-780-D

IN RE: WHEAT FARMERS ANTITRUST
CLASS ACTION LITIGATION

AMENDMENT TO JUDGMENT

(Filed November 13, 1979)

The Court having issued its Order on June 25, 1979, and Judgment having been entered thereon on June 25, 1979, and defendants having moved by Motion, dated July 3, 1979, to amend the Judgment, the Court finds that said Motion should be granted.

It is therefore Ordered that the Judgment entered herein on June 25, 1979, is amended as follows:

1. The claims of all members of the classes, conditionally certified pursuant to order dated June 30, 1975, in each of the five consolidated cases herein, who did not sell wheat directly to any of the defendants during the applicable period are dismissed with prejudice; and

2. The claims of all members of the classes who did sell wheat directly to any of the defendants during the applicable period are dismissed without prejudice.

Dated this 13th day of November, 1979.

/s/ FRED DAUGHERTY
Fred Daugherty
United States District Judge

ENTERED IN JUDGMENT DOCKET ON NOV. 13, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

M.D.L. Docket No. 129
IN RE: WHEAT FARMERS ANTI-TRUST
CLASS ACTION LITIGATION
CIV-73-779-D

JOE ZINSER, Individually and on behalf of each and all other persons similarly situated who were wheat farmers and sold wheat on the open market from May 1, 1972, until September 1, 1972, in the following counties of the State of Texas: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Oldham, Potter, Carson, Gray, Deaf Smith, Randall, Armstrong, Parmer, Castro, Swisher, Hale, Briscoe, Floyd, Childress, Hardeman, Foard, Wilbarger, Wichita, Knox, Baylor, Archer, Haskell, Throckmorton, Young, and Clay, *Plaintiffs*,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Defendants.

N. D. Texas, Civil Action No. 2-1309, AMENDED

COMPLAINT

(Filed August 15, 1974)

Now COMES the Plaintiff and alleges upon information and belief that:

1. This Complaint is filed and this action is instituted against the Defendants under authority of Sections 4 and 12 of the Clayton Act (15 U.S.C.A. §§ 15 and 22) in order to recover treble damages for injuries received by Plaintiff in his business or property as a consequence of Defendants' violation of the antitrust laws, as hereinafter alleged, spe-

cifically, Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2).

2. Under authority of Rule 23, this action is brought as a class action on behalf of the named Plaintiff, as well as on behalf of each and all other persons similarly situated who are wheat farmers and sold wheat on the open market from May 1, 1972, until September 1, 1972, in the following counties of the State of Texas, to-wit: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Oldham, Potter, Carson, Gray, Deaf Smith, Randall, Armstrong, Parmer, Castro, Swisher, Hale, Briscoe, Floyd, Childress, Foard, Hardeman, Wilbarger, Wichita, Knox, Baylor, Archer, Haskell, Throckmorton, Young and Clay.

3. The class of Plaintiffs consists of approximately 12,000 wheat farmers who sold wheat between May 1, 1972, and September 1, 1972, in the area included within the class; therefore, the number constituting the class is so numerous as to make it impracticable to bring them all before this Court.

4. The right which is the subject of this action is common to all of the above identified wheat farmers, and there are questions of law and fact that are common to each member of the class. Claims of the named Plaintiff are typical of the claims of other members of the class; and the Plaintiff will fairly and adequately protect the interest of each as required by Federal Rule 23.

5. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudication which would establish incompatible standards of conduct for the Defendants. Further, the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication

of the controversy. Through the class action, the Defendents will not be required to defend a multiplicity of suits that might be filed over a long period of time. There will likewise be no difficulties likely to be encountered in the management of the class action. Members of the class can easily be identified and notified that this action has been filed.

The Parties

6. The named Plaintiff is a citizen of the State of Texas and operates a wheat farm in Deaf Smith County, Texas.

7. Clarence Palmby, an individual, resides at 45 Sutton Place, New York, New York, and is the Vice President of the Defendant, Continental Grain Company. He is the former Assistant Secretary of the United States Department of Agriculture.

8. Continental Grain Company, a Delaware corporation with its principal place of business in New York, conducts business within the Northern District of Texas. It has an agent and representative in Hereford, Deaf Smith County, Texas.

9. Each of the above named Defendants were and are interested in wheat trading, buying and selling in interstate and foreign commerce and Continental Grain Company is engaged in interstate and foreign commerce, specifically in the business of exporting grain, including wheat, from the United States into the world market. A substantial share of this grain comes from the fields of Texas located within the jurisdiction of this Court.

Statement of Facts

10. In 1969, there was a total seeded area in wheat in the United States of about 54,312,000 acres. The geographical center of the wheat acreage in the United States falls on the Kansas-Nebraska line, near the Colorado boundary.

11. There are about 42 states in which wheat of several varieties is grown. Of the total 54,312,000 seeded acres in 1969, hard red winter wheat accounted for 32,309,000 acres. Of the 32,309,000 seeded acres of hard red winter wheat in 1969, 5,299,000 acres were located in the State of Oklahoma; about 3,500,000 acres were located in Texas; about 3,000,000 acres were located in Nebraska; about 10,000,000 acres were located in Kansas; and about 3,000,000 acres were located in Colorado.

12. Hard red winter wheat is harvested at different times. Harvesting starts at the southern edge of the hard winter wheat belt in Texas and moves north through Oklahoma, Kansas, Nebraska and Colorado. In the State of Texas, 1962, through 1966, crop average production of wheat was 60,621,000 bushels. In 1968, the production of wheat in Texas was 84,150,000 bushels. Parmer County produced 3,724,000 bushels of wheat in 1968. Deaf Smith County produced 5,060,000 bushels of wheat in 1968. A large portion of the wheat produced in Texas is on irrigated lands in the Panhandle and in the Northern District of Texas. Texas produced about 84,000,000 busheis of wheat in 1972.

13. Harvest time for the 1972 Texas wheat crop in the area included in this Complaint was in the months of May, June and July. In such 34 Texas counties, approximately 34,008,400 bushels of hard red winter wheat was harvested from approximately 1,492,200 acres of land. Approximately 24,629,423 bushels were sold within the 34 county area during the months of May, June, July and August of 1972.

14. There is a number of ways for a farmer to handle his wheat crop. He can store it in his own silo or elevator; he can place the grain with a co-op elevator; he can contract or sell to a privtae elevator; he can sell on the Board of Trade; or he can participate in the United States Government loan program. Under the latter program, the farmer can take $1.25 per bushel from the Government as a loan and take one year to sell on the open market.

15. The named Plaintiff, JOE ZINSER, of Hereford, Texas, operates an irrigated farm in Deaf Smith County, Texas. He harvested approximately 150 acres of wheat in the latter part of May and in June of 1972, from his irrigated wheat crop grown in Deaf Smith County, Texas. This wheat crop yielded about 50 bushels per acre, or approximately 7,500 bushels. Plaintiff sold his wheat, which is called winter wheat, and which had been planted in the Fall of 1971, soon after it was harvested in the latter part of July, 1972, for $1.43 per bushel and for a total of $10,720.00. If Plaintiff had known that the international sales were being negotiated by Continental Grain Company and by Clarence Palmby, or that a sale to Russia was to be made, he would have known that the price would have increased and he would not have sold his wheat at that time, but would have held it. Plaintiff could have placed said wheat in the commodity loan if he had been aware of what was taking place. If Plaintiff had held his wheat, he could have received at least 50 cents per bushel more for his wheat than he did receive, and this would have increased his income by $3,750.00 from his wheat yield on his wheat crop which he harvested and sold in the year 1972. Plaintiff has been and was damaged in this respect, as were all other wheat farmers who did not hold their wheat, but who sold it at harvest time, and the majority of farmers did sell their wheat when it was harvested and were damaged in the same way. Plaintiff received no word from the U.S.D.A. concerning negotiations with, treaties with, or sales to Russia. Plaintiff does his work on the farm and is not knowledgeable in foreign affairs and international relationships and trades with foreign governments.

16. Following the harvest of hard red winter wheat, farmers at the southern end of the belt, Texas and Oklahoma, sold their wheat for $1.25 to $1.32 per bushel. Based on the demand increase created by the grain needs of the Soviet Union, the prices received by Texas farmers for their wheat were substantially less than what the market price would

have been except for the price-fixing conspiracy of the Defendants.

Wheat Sale to Russia

17. The 1972 Russian wheat crop was a major failure. A severe winter with limited snow cover led to heavy winterkill of Fall-planted grains in Russia. To compensate for this loss, the Soviets increased the planting of Spring grains; however, these Spring-planted grains ran into a hot, dry Summer.

18. Approximately 419,000,000 bushels of wheat, about 20 per cent of the total 1972 American crop, had been purchased by the Soviets by early September, 1972. This massive increase in demand caused prices to increase from $1.30 or less per bushel in July, to a price of $2.50 or more per bushel in September.

19. Had the Texas farmers been made aware of the Russian wheat disaster, the would have held their grain in storage until the market forces of competition had adjusted the wheat prices upward. There are adequate storage facilities in the State of Texas.

20. The United States Department of Agriculture had knowledge of the Russian wheat disaster prior to the time that Texas farmers harvested and sold their wheat. This information was given to Continental Grain Company and was withheld from the farmers.

21. The Defendants, with prior knowledge of the Russian grain situation, violated the antitrust laws by conspiring to withhold market information that would have, if released, inflated the market price for wheat. This price-fixing conspiracy is illegal per se under Section 1 of the Sherman Act.

Facts Showing Conspiracy

22. Continental Grain Company is the largest grain dealer in the United States, and handles a majority of the

grain grown in Texas, both for domestic use and export, and Continental Grain Company has for many years enjoyed a dominating position in the market place for wheat grain, both for domestic use and for export to other countries. Continental Grain Company has offices, employees and facilities throughout the world, in practically all nations in the world, using and consuming wheat, and has at all times referred to herein, maintained a close relationship to key employees in the United States Department of Agriculture charged with the responsibility of determining and knowing the world wheat situation, including Defendant Palmby, and this close relationship existed throughout the years 1971 and 1972. The Defendant, Continental Grain Company, used its said close relationship with the United States Department of Agriculture and Palmby as an individual to suppress information concerning the above-described international wheat shortage existing in Russia and China and the necessity of both Russia's and China's having to obtain wheat as a food for their people from the United States, and that other wheat producing countries would not be able to supply such grain because of the drought condition and short supply existing in many areas of the world, including Russia and China. These facts, as well as the pending massive wheat sale to Russia and other large international grain transactions, were suppressed and kept secret as a part of the conspiracy in order that Continental Grain Company could use its dominating position in the market place to assure that Continental Grain Company and a few other grain companies selected by Continental Grain Company, were able to make all the profit on these huge and massive export deals, and at the same time, maintain the domestic price of grain at a lower level in order that Continental Grain Company might buy grain from producers such as Plaintiffs at a lower price. In order that Continental Grain Company could handle the deal without publicly disseminating information, Continental Grain Company took into its confidence other large

grain dealers, hereafter mentioned and listed. These other grain dealers hereafter mentioned who were taken into the confidence of Continental grain Company, and Clarence Palmby, were allowed to participate in the exports in order that the need could be filled without public dissemination of information, and Continental Grain Company received certain concessions and benefits from them at the same time Clarence Palmby, in turn, received certain benefits from Continental Grain Company.

23. The Defendant Continental Grain Company and those working with said Defendant export approximately 90 per cent of the total grain exported from the United States. A close relationship has been maintained between the big six grain dealers and the Department of Agriculture, with Continental Grain Company's taking the initiative. With this closeness and by working together, the Defendants were able to keep the market price suppressed until they had acquired a substantial amount of grain destined to be sold to Russia.

24. A marketing team from the Department of Agriculture, led by Secretary Earl L. Butz, first went to Russia in April, 1972, to negotiate terms of trade for the possible sale of grain to the Soviet Union. This meeting was a follow-up to the grain sale that had been made in the Fall of 1971, and it followed an expression of interest in further trade made by Soviet Minister of Agriculture Vladimir Matskevich when he visited the United States in December of 1971.

25. Included on the marketing team that went to Russia in April, 1972, with Secretary Butz were Clarence Palmby and Clifford G. Pulvermacher. Palmby, at the time, was Assistant Secretary for International Affairs and Commodity Programs for the Department of Agriculture. Pulvermacher was, at the time of negotiations with the Soviets, the Department's General Sales Manager.

26. During harvest in 1972, Continental Grain Company was busy buying the current wheat crop cheaply and storing the bulk in their massive elevators intended for export. Continental Grain Company's grain storage capacity exceeded 150 million bushels. The other grain companies herein mentioned and their storage capacity was needed by Continental Grain Company in receiving the 1972 grain crop from the producers and farmers in preparation for the massive sales contemplated to Russia and other foreign countries.

27. In June of 1972 a Russian delegation headed by M. R. Kuzmin, Soviet First Deputy Foreign Minister of Trade, came to Washington. These sessions lasted until President Nixon announced the two-nation, three-year credit agreement on or about July 8, 1972. At the same time, officials of Exportkhleb, the Soviet state trading organization, were in Washington and met with representatives and executives from Continental Grain Company in the month of June in the Madison Hotel. Clarence Palmby and Continental Grain Company officials from the company's Paris office entertained the visiting Russians. During such time, Palmby worked with the officers of Continental Grain Company and the Russian officials. The meeting between Continental Grain Company and the Russians was continued from Washington to New York, and on or about July 3, 1972, the Russians bought an estimated 147 million bushels of wheat from Continental Grain Company, which was consummated only a few hours or days before the United States-Russia agreement was signed and announced.

28. The United States agriculture attache in Moscow had been permitted by the Soviets to make a rare visit to the remote regions of Russian wheat lands in August of 1972. Reports concerning the seriousness of the Russian wheat loss were issued by the attache in June and August. By mid-August, the report concluded that the Russian grain production had worsened from earlier estimates. This re-

port, however, was never released because the Department of Agriculture deemed the findings too controversial. The market analysis was thus classified as confidential. These reports were accessible to certain ranking members of the Department and the information was released to the Defendant grain company.

29. Clarence Palmby, who as Assistant Secretary for International Affairs and Commodity Programs went to Russia to negotiate terms of trade for a possible sale of wheat in April of 1972, knew at the time that he was leaving the Department to become vice president of the Defendant, Continental Grain Company. Just before leaving for Russia, Palmby, on April 3 or 4, 1972, purchased a luxury cooperative apartment at 45 Sutton Place, New York, New York, valued from $90,000.00 to more than $100,000.00. The monthly maintenance cost for the apartment would run about $500.00 per month.

30. Palmby, described by Secretary Butz as being a man of modest means, made a large down payment on the apartment. In his application for credit, Palmby listed the four top officers of Continental Grain Company as credit references. Continental Grain Company's world headquarters are located in New York. Before acquiring this apartment, Palmby earned $38,000.00 a year at the Department of Agriculture.

31. Three days after signing the apartment purchase contract, Palmby was in Moscow as Assistant Secretary of Agriculture, negotiating the initial grain deal with Russia. On May 9, 1972, Palmby met with a high Soviet trade official in Washington to further discuss the grain deal. On May 12, 1972, Palmby informed Secretary Butz that he had received a firm offer of employment from Continental Grain Company, which offer he had decided to accept. Palmby resigned from the Department of Agriculture on June 7, 1972, and on June 8, 1972, he became vice president of Continental Grain Company.

32. The reported salary of Palmby with Continental Grain Company is $100,000.00 per year, plus expenses and other employment benefits, on a ten-year employment basis.

33. From March or early April of 1972 until June 7, 1972, Palmby held an employment contract with Continental Grain Company while at the same time serving as Assistant Secretary of Agriculture and leading the Government's negotiating team that eventually worked out the terms of the sale of wheat to Russia.

34. After leaving the Department of Agriculture, Palmby, as vice president of Continental Grain Company, on July 2, 1972, met with two members of the Russian team that had arrived to negotiate wheat purchases with Continental Grain Company. Present at this meeting was a Mr. Ziv from the Paris offices of Continental Grain Company. Three days after this meeting, July 5, 1972, Continental Grain Company concluded a 150 million bushel wheat sale to the Soviet Union.

35. Besides the negotiations with Continental Grain Company, there were two periods of negotiations on wheat sales between representatives of the Soviet Union and representatives of the Defendant grain companies. The first meeting was held from June 29 through July 21; and the second trip was from July 31 until about August 18, 1972. Soviet purchases of wheat from American companies during these two periods were as follows:

Company	*Wheat in Tons Purchased*	
	First Trip	Second Trip
Continental Grain Company	5,000,000	None
Cargill, Inc.	1,000,000	1,000,000
Louis Dreyfus Corp.	750,000	1,500,000
Cook Industries	600,000	300,000
Garnac Grain Co.	200,000	350,000
Bunge Corporation	None	600,000
Totals	7,550,000	3,750,000

36. Both of the Defendants knew of the negotiations with Russia before any harvest of hard winter wheat. The United States-Soviet credit agreement was not announced until July 8, 1972, which was three days after Continental Grain Company's first sale. The full extent of the Soviet purchases did not become apparent until after the Russians returned to Moscow about August 21, 1972.

37. It was mutually advantageous for the Defendants to suppress any information they held on the wheat transactions with Russia at least until the Defendant, Continental Grain Company, had acquired on the market sufficient amounts of wheat and wheat futures to satisfy its contractual obligations with Russia. Because of the closeness of these companies, they were able to conduct negotiations from June 29 without revealing the condition of the market to the farmers. To ensure this silence, the Defendants with a close personal relationship with the Department of Agriculture were able to suppress an official Government report completed August 18, 1972.

38. Some information concerning the Soviet buying did become known in the trade. As a result, the domestic market price for wheat rose to $1.76 per bushel by mid-July and $1.78 per bushel by the time the Russians returned to Moscow. Subsequently, when the full extent of the Soviet purchases became known, the price rose to $2.50 a bushel.

39. The close relationship of the grain companies with the Department of Agriculture is demonstrated by the flow of personnel from the Department into the companies and from the companies into the Department. Clarence Palmby had been Assistant Secretary of Agriculture until he resigned on June 7, 1972, to become vice president of Continental Grain Company. Clifford Pulvermacher, who went to Russia with Palmby in April of 1972, resigned his position with the Department as General Sales Manager on June 30, 1972, to become the Washington representative for the Bunge Corporation.

40. George Shanklin had been the Washington representative for the Bunge Corporation. He left Bunge and became employed by the Department of Agriculture, as Assistant Sales Manager in the Department of Export marketing service commodity exports, on February 14, 1974.

41. William R. Pearce left Cargill, Inc., in February, 1972, to join President Nixon's staff at the White House and the Department of Agriculture to get Cargill included in last year's feed grain sale to the Soviet Union.

Profits Made by Grain Companies

42. The Defendants made excessive profits on their sale of wheat to Russia in two ways. First, they made a profit represented by the difference between the low price paid to farmers and the higher price received in the sale to Russia. The second profit was in the form of a subsidy paid by the Government.

43. The Russians were able to buy wheat at the prevailing world price of $1.63 to $1.65 a bushel, with the Government of the United States paying the exporter a subsidy measured by the difference between the world and domestic prices. This subsidy, however, was not determined on the basis of the domestic price on the date of the sale. Instead, it was the domestic price on the day that the grain exporter registered the sale with the Department of Agriculture.

44. With knowledge that the domestic wheat prices would increase as information was released to the farmers, the grain companies sold their wheat to the Soviets and postponed filing the notification of sale. For example, the subsidy paid on July 13 was 13 cents; however, as the domestic price continued to rise, a subsidy of 36 cents was being paid on August 14.

45. The Department of Agriculture during the latter part of August decided to suspend subsidy payments on wheat exports. Wheat dealers would, following the suspen-

sion, be required to compete in the world market on their own. Because of the shortage of wheat, however, the world price became the domestic price in the United States.

46. On August 24, 1972, Charles Pence, of the Department of Agriculture, telephoned Continental Grain Company and each of the grain companies to give them a "tip off" of the impending change in the wheat subsidy program. They were told not to assume that sales made after the close of business on August 23, 1972, would necessarily qualify for export subsidy payments. The Department of Agriculture then announced that exporters would be allowed an additional five days within which they could register sales made prior to August 24 and receive subsidy payments. During this five-day period a subsidy of 47 cents a bushel was paid for hard winter wheat.

47. During these last five business days, the Continental Grain Company, the Defendant, and the other grain companies registered for subsidy payments 166 million bushels of wheat. Total subsidies paid during this period, most of them at 47 cents a bushel for wheat sold to Russia, amounted to more than 77 million dollars. The 166 million bushels of wheat registered during the special five-day period represented about 40 per cent of the total amount of wheat sold to Russia—419 million bushels. Continental Grain Company received the larger benefit.

Antitrust Violations

48. Continental Grain Company entered into an agreement or conspiracy with Clarence D. Palmby and others unknown to Plaintiff at this time in restraint of trade or commerce among the several states and with foreign nations. Through this agreement, which provided special market information to Continental Grain Company and suppressed the information from being released to the public, the domestic market price for hard winter wheat was depressed. This, being a price-fixing conspiracy, is

illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

49. The Defendants had knowledge that concerted action to suppress market information from wheat farmers in order to keep prices low was contemplated and invited. With this knowledge, the Defendants gave their adherence to the scheme and participated in it. This is a price-fixing conspiracy, illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

50. The Defendants agreed, reached some understanding or conspired among themselves to inflate the domestic market price for wheat after purchasing most of their needs for the Russian sale in order to increase their subsidy payments. This is a price-fixing conspiracy, illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

51. The Defendants conspired among themselves and with the Secretary of the Department of Agriculture, Earl L. Butz, and other employees of the Department of Agriculture to preserve low wheat prices during the period of negotiations by Continental with the Russians.

52. The Defendants, Continental Grain Company and Clarence Palmby, acted together in a common conspiracy which was intended to and did restrain trade and commerce among the several states and with foreign nations for their respective benefits to the detriment of the farmers and producers of wheat and did, by their so acting together and by their secretive dealings, as hereinabove set forth, enable Continental Grain Company to buy wheat for its own account, at and below what would have been the market value for such wheat and the price for which such wheat would have sold except for the accomplishments by their said conspiracy in keeping secret the massive sales which were known by them, but unknown to the farmers and producers of wheat grain. Such actions were predatory, anticompetitive and unfair practices made in bad faith and such con-

duct was inequitable and was in restraint of trade, and was not only an attempt to, but in fact did, monopolize the market in violation of law and was price-fixing and illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

53. The Defendant, Continental Grain Company, did attempt to monopolize and hold for itself and its friends the opportunity to sell wheat to Russia and other foreign countries at higher prices to the exclusion of other wheat dealers by maintaining a blanket of secrecy concerning the above described large foreign wheat sales, and the said Continental Grain Company did attempt to monopolize such trade in wheat with foreign nations and did monopolize such trade and did combine or conspire with Clarence Palmby, Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Garnac Grain Company and Bunge Corporation, to monopolize the above described sales of wheat to foreign countries in violation of Section 2 of the Sherman Antitrust Act (15 U.S.C.A. § 2). The effect of such monopoly and conspiracy to monopolize and attempt to monopolize was to maintain the price of domestic wheat at a falsely low level to the injury and damage of your Plaintiffs herein, in that the other grain dealers who were not privileged to obtain and have the information which Palmby made available to Continental Grain, and Continental Grain Company made available to its friends, the other dealers in domestic wheat were unaware of the true demand for wheat and therefore, did not offer and would not pay as much to your Plaintiffs as they would have paid had Plaintiffs not been the victims of the monopoly, attempt to monopolize, and combination and conspiracy to monopolize above described.

Injury to Plaintiff Wheat Farmers

54. As a direct result of the Defendants' conspiracy to fix wheat prices, the Plaintiff wheat farmers were injured in their business or property. The Plaintiffs lost the differ-

ence between what they actually received for their wheat and what they would have received for the wheat except for the conspiracy to withhold information.

55. It is impossible to accurately assess the total damage to the Plaintiffs as a class; however, after sufficient opportunity for discovery, Plaintiffs as a class will be able to present sufficient evidence from which this Court or a jury will be able to draw a reasonable inference as to the exact amount of injury. As a reasonable estimate, with the possibility that the Plaintiff will need to amend the Complaint, damages to the class resulting from Defendants' antitrust violations was Fifty Million Dollars ($50,000,000.00).

56. The named Plaintiff lost approximately Three thousand, seven hundred fifty Dollars ($3,750.00) in lost profits as a direct result of the price-fixing conspiracy of the Defendants.

Relief Requested

WHEREFORE, Plaintiff prays:

1. That the Defendants be adjudged to have violated Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 and 2).

2. That the Plaintiff be allowed to recover threefold the damages sustained by them, plus the costs of suit, including reasonable attorneys' fees as authorized by Section 4 of the Clayton Act (15 U.S.C.A. § 15).

3. That the Plaintiffs have such other and further relief as may be just and proper.

WITHERSPOON, AIKIN, LANGLEY
WOODS, KENDRICK & GULLEY
P. O. Box 1818
Hereford, Texas 79045

By: /s/ JAMES W. WITHERSPOON
Attorneys for Plaintiff

JURY DEMAND

Plaintiff respectfully demands trial by jury on each and every issue in this cause.

/s/ JAMES W. WITHERSPOON
James W. Witherspoon

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was mailed, certified mail, postage prepaid, this 14th day of August, 1974, to Mr. Neal R. Allen, Attorney at Law, P. O. Box 189, Amarillo, TX 79101, and Mr. Judson S. Woodruff, (Designated liaison counsel for all defendants in all referenced cases), 5th Floor, 100 Park Avenue, Oklahoma City, OK 73102.

/s/ JAMES W. WITHERSPOON
James W. Witherspoon

TWK/rdw

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1-505-762-4544
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

MDL Docket No. 129
Civil Action No. CIV. 73-780 (D)
CA-2-1330 Amarillo

Pursuant to Rule 38 of the Federal Rules of Civil Procedure, the Plaintiffs Hereby Demand a Jury Trial on All Issues.

JOHN SPEARMAN, individually and on behalf of each and all other persons similarly situated who were wheat producers in Curry County, State of New Mexico and sold wheat on the open market from May 1, 1972, until September 1, 1972,
Plaintiffs,

-vs-

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,
Defendants.

FIRST AMENDED COMPLAINT

(Filed September 3, 1974)

COMES Now the Plaintiff and alleges upon information and belief that:

Jurisdiction and Venue

1. This Complaint is filed and this action is instituted against the Defendants under authority of Sections 4 and 12 of the Clayton Act (15 U.S.C.A. §§ 15 & 22) in order to recover treble damages for injuries received by Plaintiff

in his business or property as a consequence of Defendants' violation of the antitrust laws, as hereinafter alleged, specifically, Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§ 1 & 2).

Class Action

2. Under authority of Federal Rule 23, this action is brought as a class action on behalf of each and all other persons similarly situated who are wheat producers within Curry County, State of New Mexico, whether resident or non-resident, who sold wheat produced within said county between the dates of May 1, 1972 until September 1, 1972, either by contract or by spot sale, specifically excluding commodity futures trading.

3. The class of Plaintiffs consists of approximately 1,500 wheat producers in Curry County, New Mexico; therefore, the number constituting the class is so numerous as to make it impracticable to bring them all before the Court. All farms in said County produce wheat with the exception of an insignificant few. A complete list of all 1972 crop producers in Curry County, New Mexico, with name, address, farm size and location is available and in the custody of Plaintiff. All landlords, property owners, share-croppers, tenants and persons having an interest in farm land and crops grown thereon are listed therein.

4. The right which is the subject of this action is common to all of the above identified wheat farmers, and there are questions of law and fact that are common to each member of the class. Claims of the named Plaintiff are typical of the claims of the other members of the class; and the Plaintiff will fairly and adequately protect the interest of each as required by Federal Rule 23. Records are available reflecting all sales made by the Plaintiffs within the defined class and same reflect the amount of damage incurred by each plaintiff and total damages incurred by the class. The total sum of damages incurred due to Defendants' acts herein complained of may be determined easily and accurately.

5. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudication which would establish incompatible standards of conduct for the Defendants. Further, the questions of law and fact common to the members of the class predominate over any questions affecting only individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy. Through the class action, the Defendents will not be required to defend a multiplicity of suits that might be filed over a long period of time. There will likewise be no difficulties likely to be encountered in the management of the class action. Members of the class can easily be identified and notified that this action has been filed.

The Parties

6. The named Plaintiff is a citizen fo the State of New Mexico and at all times pertaining hereto operated a wheat farm in Curry County, State of New Mexico, and also operated a small farm in Parmer County, Texas. An insignificant number of the producers within the heretofore described class of Plaintiffs produce wheat in both Curry County, New Mexico, and the State of Texas or Curry County, New Mexico, and any other area of New Mexico.

7. Clarence Palmby, an individual, resides at 45 Sutton Place, New York, New York, and is the Vice President of the Defendant, Continental Grain Company. He is the former Assistant Secretary of the United States Department of Agriculture.

8. Continental Grain Company, a Delaware corporation with its principal place of business in New York, conducts business within the Northern District of Texas and the District of New Mexico. It has an agent and representative in Hereford, Deaf Smith County, Texas, for service of process named Dennis Wosnitzky. It is qualified to do business in the State of New Mexico and its registered

agent for service of process is The Corporation Company, 220 Otero Street, Santa Fe, New Mexico.

9. Each of the above named Defendants were and are interested in wheat trading, buying and selling in interstate and in foreign commerce specifically in the business of exporting grain, including wheat, from the United States into the world market. A substantial share of this grain comes from the fields of Texas located within the jurisdiction of this Court with only a portion from Curry County, New Mexico, which is well within one hundred miles of the location of this Court.

Statement of Facts

10. In 1969, there was a total seeded area in wheat in the United States of about 54,312,000 acres. The geographical center of the wheat acreage in the United States falls on the Kansas-Nebraska line near the Colorado Boundary.

11. There are about 42 states in which wheat of several varieties is grown. Of the total 54,312,000 seeded acres in 1969, hard red winter wheat accounted for 32,309,000 acres. Of the 32,309,000 seeded acres of hard red winter wheat in 1969, 5,299,000 acres were located in the State of Oklahoma; about 3,500,000 acres were located in Texas; about 3,000,000 acres were located in Nebraska; about 10,000,000 acres were located in Kansas; about 3,000,000 acres were located in Colorado and about 288,000 acres were located in New Mexico.

12. Hard red winter wheat is harvested at different times. Harvesting starts at the southern edge of the hard winter wheat belt in Texas and moves north through New Mexico, Oklahoma, Kansas, Nebraska and Colorado. In the State of New Mexico, the 1972 crop production of wheat was 4,335,000 bushels; the 1971 crop production of wheat was 3,840,000 bushels; the 1970 crop production of wheat was 5,152,000 bushels; the 1969 crop production of wheat was 4,293,000 bushels; the 1968 crop production of wheat was 3,948,000 bushels. Curry County, New Mexico produced

2,783,000 bushels of wheat in 1971 and 3,274,000 bushels in 1972. A large portion of the wheat produced in New Mexico is on irrigated lands in Curry County.

13. Harvest time for the 1972 Curry County, New Mexico, wheat crop, as always, was in the months of June and July.

14. There are a number of ways for a Curry County wheat producer to handle his wheat crop. A producer may store his commodity in a commercial or public elevator with sale thereof to or through said concern. During the period of storage, the producer may acquire funds by a non-recourse loan from the Commodity Credit Corporation. During all periods of time relevant hereto the said loan rate was $1.27 per bushel with a premium of four cents per bushel on 13 percent protein wheat for a total of $1.31 per bushel on the said loan. All commercial and public elevators handling the subject wheat during the periods relevant hereto utilized an in-house average protein ratio of 13 percent and netted the producer $1.31 per bushel on the said non-recourse loan. Said loans, whether the Curry County, New Mexico, grain was stored in Texas or New Mexico, matured on April 30, the following year and could be extended by government action. The interest rate on said loans was 3½ percent per annum with storage charges negotiable between the producer and the elevator, but not exceeding 2.1 cents per month per hundredweight. During the extended loan period, the government paid all storage charges. If the price of wheat exceeded the original loan balance plus interest and storage charges for the initial period, the producer could redeem his loan and sell the commodity thereby acquiring the difference. If the price of wheat never rose above the original loan balance plus said charges, the producer could keep the $1.31 per bushel without further obligation. Where there is no information to reflect a future increase in price, the producer usually sells his crop at harvest or soon thereafter. Conversely, when there is a possibility of a price increase, the producer

will make use of the government loan program. Producers in Curry County, New Mexico have very few on-farm grain storage facilities and do not store wheat on the farm since the government loan rate covers only 80 percent of $1.27 per bushel, weather conditions make such facilities unsuitable and most commercial and public elevators did not charge storage up to the first of the next year.

15. The named Plaintiff, John Spearman, of Clovis, New Mexico, operates an irrigated and dryland farm in Curry County, New Mexico, and also a small farm in Parmer County, Texas. He harvested 22,962 bushels of wheat in the latter part of June and July, 1972, from his irrigated farms in Curry County, New Mexico, and Parmer County, Texas, with a total of 2,045 bushels thereof having to be harvested from his farm in Parmer County, Texas, and 20,917 bushels from his farm in Curry County, New Mexico. Plaintiff sold his wheat, which is called hard red winter wheat, which had been produced in Curry County, New Mexico, and which had been planted in the fall of 1971, soon after it was harvested on July 5, 1972, for $1.35 per bushel for a total of $28,237.95. If Plaintiff had known that the international sales were being negotiated by Continental Grain Company and by Clarence Palmby or that a sale to Russia was to be made, he would have known that the price would have increased and he would not have sold his wheat at that time, but would have held it. Plaintiff would have placed said wheat in the commodity loan if he had been aware of what was going on. If Plaintiff had held his Curry County, New Mexico, produced wheat, he could have received a least $.45 (forty-five cents) per bushel more for his wheat than he did receive and this would have increased his income by $9,412.65 from his wheat sold in the year 1972. Similarly, producers with wheat on storage from a prior year's crop could have extended their loans without cost, which extension was available, to April 30, 1973, and acquired the higher price. Plaintiff has been and was damaged in this respect as were all other wheat farmers who did not hold

their wheat, but who sold it at harvest time (and the majority of farmers did sell their wheat when it was harvested), and between May 1, 1972, and September 1, 1973, and were likewise damaged in the same way. Plaintiff received no word from the U.S.D.A. concerning negotiations with, treaties or sales to Russia during this period of time. Plaintiff does his work on the farm and is not skilled and is not knowledgable in foreign affairs and international relationships and trades with foreign governments, nor are other wheat producers in Curry County, New Mexico. They rely mostly on Government information.

16. From the harvest of hard red winter wheat, farmers at the southern end of the wheat belt, Texas, New Mexico, and Oklahoma, sold their wheat for $1.25 to $1.35 per bushel. Based on the demand increase created by the grain needs of the Soviet Union, the prices received by Curry County, New Mexico, wheat producers for their wheat were substantially less than what the market price would have been except for the herein described unlawful acts of the Defendants.

Wheat Sale to Russia

17. The 1972 Russian wheat crop was a major failure. A severe winter with limited snow cover led to heavy winterkill of fall-planted grains in Russia. To compensate for this loss, the Soviets increased the planting of spring grains; however, spring-planted grains ran into a hot, dry summer.

18. Approximately 419,000,000 bushels of wheat, about 20 percent of the total 1972 American crop, had been purchased by the Soviets by early September, 1972. This massive increase in demand caused prices to increase from $1.30 or less per bushel in July, to a price of $2.50 or more per bushel in September.

19. Had the New Mexico wheat producers been made aware of the Russian wheat disaster, they would have held

their grain in storage until the market forces of competition had adjusted the wheat prices upward. There are adequate storage facilities available to handle and store the 1972 crop and the prior crops on storage during the subject period.

20. The United States Department of Agriculture and/or its employees had knowledge of the Russian wheat disaster prior to the time that Curry County, New Mexico, farmers harvested and/or sold their wheat. This information in full was given to the Continental Grain Company and was withheld in whole or part from said wheat producers. The United States Department of Agriculture and/or its employees had knowledge of the Russians' "stunning proposition" to purchase wheat in 1972. This information was similarly withheld from said wheat producers.

21. The Defendants, with prior knowledge of the Russian grain situation, violated the antitrust laws by conspiring to withhold market information that would have, if released, inflated the market price for wheat. This price-fixing conspiracy is illegal per se under Section 1 of the Sherman Act as interpreted by the Supreme Court in *United States v. Socony-Vacuum Oil Company*, 310 U.S. 150 (1940). Further, said acts are an attempt to monopolize or to combine or conspire to monopolize the wheat trade or commerce, illegal per se under Section 2 of the Sherman Act.

Facts Showing Conspiracy

22. Continental Grain Company is the largest grain dealer in the United States, and handles a majority of the grain grown in Texas and New Mexico, both for domestic use and export. Continental Grain Company has for many years enjoyed a dominating position in the market place for wheat grain, both for domestic use and for export to other countries. Continental Grain Company has offices, employees and facilities throughout the world, in practically all nations in the world using and consuming wheat. Con-

tinental Grain Company has at all times referred to and maintained a close relationship to key employees in the United States Department of Agriculture charged with the responsibility of determining and knowing the world wheat situation, including Defendant Palmby. Through close relationship with the United States Department of Agriculture, employees and Palmby as an individual, it suppressed information concerning the extent of the above described international wheat shortage existing in Russia and the necessity of Russia having to obtain sizable quantities of wheat as a food for their people from the United States, and that other wheat producing countries would not be able to supply such grain on account of the extent of the drought condition and short supply existing in many areas of the world, including Russia. These facts, as well as the size of the pending massive wheat sale to Russia and purchase of grain therefor and other large international grain transactions, were suppressed and kept secret or released untimely and unlawfully as part of the conspiracy in order that Continental Grain Company could use its dominating position in the market place to assure that Continental Grain Company might buy grain from producers such as Plaintiff at a lower price. At the same time and later, Clarence Palmby in turn received certain benefits from Continental Grain Company. Said acts on the part of Clarence Palmby and other employees of the Department of Agriculture were outside and contrary to their respective authority and employment and were thus not acts of government.

23. The Defendant grain trade corporation and those working with said Defendant exported approximately 50 percent of the total grain exported out of the United States. A close relationship has been maintained between the defendant grain corporation and the employees of the Department of Agriculture, with Continental Grain Company taking the initiative. With this closeness and by working together, the Defendants were able to keep the market price suppressed until Defendant grain corporation had

acquired a substantial amount of grain destined to be sold and already sold to Russie.

24. A marketing team from the Department of Agriculture, led by Secretary Earl L. Butz, first went to Russia in April, 1972, to negotiate terms of trade for the possible sale of grain to the Soviet Union. This meeting was a follow-up to the grain sale that had been made by Soviet Minister of Agriculture, Vladimir Matskevich, when he visited the United States in December, 1971.

25. Included on the marketing team that went to Russia in April, 1972, with Secretary Butz were Clarence Palmby and Clifford V. Pulvermacher. Palmby at the time was Assistant Secretary for International Affairs and Commodity Programs for the Department of Agriculture. Pulvermacher was, at the time of negotiations with the Soviets, the Department's General Sales Manager.

26. During harvest in 1972, Continental Grain Company was busy buying the current wheat crop cheaply and storing the bulk in their massive elevators intended for export before the subject producers received the information withheld. Continental Grain Company's grain storage capacity exceeded 150 million bushels.

27. In June, 1972, a Russian delegation headed by M. R. Kuzmin, Soviet First Deputy Foreign Minister of Trade, came to Washington. These sessions lasted until President Nixon announced the two-nation, three-year credit agreement on or about July 8, 1972. At the same time, officials at Exportkhleb, the Soviet state trading organization, were in Washington and met with representatives and executives from Continental Grain Company in the month of June in the Madison Hotel. Clarence Palmby and Continental Grain Company officials from the company's Paris office entertained the visiting Russians. During such time Palmby worked with the officers of Continental Grain Company and the Russian officials, the meeting between Continental Grain Company and the Russians was continued

from Washington to New York, and on or about July 3, 1972, the Russians bought an estimated 147 million bushels of wheat from Continental Grain Company, which was consummated only a few hours or days before the United-States-Russia agreement was signed and announced.

28. The United States agriculture attache in Moscow had been permitted by the Soviets to make a rare visit to the remote regions of Russia wheat lands in August, 1972. Reports concerning the seriousness of the Russian wheat loss were issued by the attache in June and August. By mid-August, the report concluded that the Russian grain production had worsened from earlier estimates. This report, however, was never released because employees of the Department of Agriculture deemed the findings too controversial. The market analysis was thus without cause classified as confidential. These reports were accessible to certain ranking members of the Department and the information was released to the Defendant grain company.

29. Clarence Palmby, who as Assistant Secretary for International Affairs and Commodity Programs went to Russia to negotiate terms of trade for a possible sale of wheat in April of 1972, knew at the time that he was leaving the Department to become Vice President of the Defendant, Continental Grain Company. Just before leaving for Russia, Palmby, on April 3 or 4, 1972, purchased a luxury cooperative apartment at 45 Sutton Place, New York, New York, valued from $90,000.00 to more than $100,000.00. The monthly maintenance cost for the apartment would run about $500.00 per month.

30. Palmby, described by Secretary Butz as being a man of modest means, made a large down payment on the apartment. In his application for credit, Palmby listed the four top officers of Continental Grain Company. Continental Grain Company's world headquarters are located in New York. Before acquiring this apartment, Palmby earned $38,000.00 a year at the Department of Agriculture.

31. Three days after signing the apartment purchase contract, Palmby was in Moscow as Assistant Secretary of Agriculture, negotiating the initial grain deal with Russia. On May 9, 1972, Palmby met with a high Soviet trade official in Washington to further discuss the grain deal. On May 12, 1972, Palmby informed Secretary Butz that he had received a firm offer of employment from Continental Grain Company, which he had decided to accept. Palmby resigned from the Department of Agriculture on June 7, 1972, and on June 8, 1972, he became Vice-President of Continental Grain Company.

32. The reported salary of Palmby with Continental Grain Company is $100,000.00 per year, plus expenses and other employment benefits, on a ten-year employment basis.

33. From March or early April, 1972, until June 7, 1972, Palmby held an employment contract with Continental Grain Company while at the same time serving as Assistant Secretary of Agriculture and leading the Government's negotiating team that eventually worked out the terms of the sale of wheat to Russia.

34. After leaving the Department of Agriculture, Palmby, as Vice-President of Continental Grain Company, on July 2, 1972, met with two members of the Russian team that had arrived to negotiate wheat purchases with Continental Grain Company. Present at this meeting was a Mr. Ziv from the Paris offices of Continental Grain Company. Three days after this meeting, July 5, 1972, Continental Grain Company concluded a 150-million-bushel wheat sale to the Soviet Union.

35. Besides the negotiations with Continental Grain Company, there were two periods of negotiations on wheat sales between representatives of the Soviet Union and representatives of the Defendant grain companies. The first meeting was held from June 29 through July 21; and the second trip was from July 31 until about August 18, 1972.

Soviet purchases of wheat from American companies during these two periods were as follows:

Company	*Wheat in Tons Purchased*	
	First Trip	Second Trip
Continental Grain Company	5,000,000	None
Cargill, Inc.	1,000,000	1,000,000
Louis Dreyfus Corp.	750,000	1,500,000
Cook Industries	600,000	300,000
Garnac Grain Co.	200,000	350,000
Bunge Corp.	None	600,000
Totals	7,550,000	3,750,000

Defendant Continental Grain Company was the only grain company trading with the Russians who made a profit, and did make substantial profits whereby it did monopolize the grain trade. Said excess profits were a result of the herein alleged conspiracy.

36. Each of the Defendants knew of the negotiations with Russia before any harvest of hard winter wheat. The United States-Soviet credit agreement was not announced until July 8, 1972, which was three days after Continental Grain Company's first sale. The full extent of the Soviet purchase did not become apparent until after the Russians returned to Moscow about August 21, 1972. Clarence Palmby, while an employee of the Department of Agriculture and Continental Grain Company, knew the size of the Russian appetite for wheat and withheld said information from the Department and the subject wheat producers as a part of the Defendants' conspiracy. Clarence Palmby, while an employee of the Department of Agriculture and Continental Grain Company, knew of the grain credit agreement with Russia that was announced July 8, 1972, and knew that Russia would take all the wheat thereunder in 1972 instead of over a three-year period and withheld said information from the Department and the subject producers as a part of the Defendants' conspiracy. Said acts of Defend-

ant Palmby were done individually or in conspiracy with other employees of the Department of Agriculture either directly or indirectly, at the instance of Palmby and Continental Grain Company.

37. It was mutually advantageous for the Defendant grain corporation to suppress any information it held on the wheat transactions with Russia at least until the said Defendant had acquired in the market sufficient amounts of wheat and wheat futures to satisfy its contractual obligations with Russia. The Defendant grain corporation with a close personal relationship with the Department of Agriculture was able through Defendant Clarence Palmby and others at his instance to suppress an official Government report completed August 18, 1972.

38. Some information concerning the Soviet buying did become known in the trade. As a result the domestic market price of wheat rose to $1.76 per bushel by mid-July and $1.78 per bushel by the time the Russians returned to Moscow. Subsequently, when the full extent of the Soviet purchases became known, the price rose to $2.50 per bushel.

39. The close relationship of the Defendant grain corporation with the Department of Agriculture is demonstrated by the flow of personnel from the Department into the said corporation and from the said corporation into the Department. Clarence Palmby had been Assistant Secretary of Agriculture until he resigned on June 7, 1972, to become Vice-President of Continental Grain Company. Carroll G. Brunthaver, who prior to taking employment with the Department of Agriculture had been employed as an associate research director for Cook Industries, a grain concern like Continental Grain Company, was Assistant Secretary of Agriculture for International Affairs during the 1972 Russian wheat deal and had been moved into said position only one week prior to the Russian deal. Brunthaver handled the export subsidy transaction for the wheat deal to Russia, and was fully informed of the massive

size of the Russian purchase from Continental on July 3, 1972. Carroll G. Brunthaver filled Clarence Palmby's position and was an old friend and protege.

Profits Made by Grain Companies

40. The Defendant, Continental Grain Company, made excessive profits on its sale of wheat to Russia in two ways. First, they made a profit represented by the difference between the low price paid to farmers and the higher price received in the sale to Russia. The second profit was in the form of a subsidy paid by the Government.

41. The Russians were able to buy wheat at the prevailing world price of $1.63 to $1.65 a bushel, with the Government of the United States paying the exporter a subsidy measured by the difference between the world and domestic prices. This subsidy, however, was not determined on the basis of the domestic price on the date of the sale. Instead, it was the domestic price on the day that the grain exporter registered the sale with the Department of Agriculture.

42. With knowledge that the domestic wheat prices would increase as information was released to wheat producers, the Defendant grain company sold its wheat to the Soviets and unlawfully postponed filing the notification of sale. Said acts of the Defendant Continental Grain Company are a per se violation of Sections 1 and 2 of the Sherman Act. For example, the subsidy paid on July 13 was 13 cents; however, as the domestic price continued to rise, a subsidy of 36 cents as being paid on August 14.

43. The Department of Agriculture during the latter part of August decided to suspend subsidy payments on wheat exports. Wheat dealers would, following their suspension, be required to compete in the world market on their own. Because of the shortage of wheat, however, the world price became the domestic price in the United States.

44. On August 24, 1972, Charles Pence, of the Department of Agriculture, telephoned Continental Grain Company to give it a "tip off" of the impending change in the wheat subsidy program. It was told not to assume that sales made after the close of business on August 23, 1972, would necessarily qualify for export subsidy payments. The Department of Agriculture then announced that exporters would be allowed an additional five days within which they could register sales made prior to August 24, and receive subsidy payments. During this five-day period a subsidy of 47 cents per bushel was paid for hard winter wheat.

45. During these last five business days, Continental Grain Company registered for subsidy payments a large number of bushels of wheat. Total subsidies paid during this period, most of them at 47 cents a bushel for wheat sold to Russia, amounted to more than 77 million dollars. The 166 million bushels of wheat registered during the special five-day period represented about 40 percent of the total amount of wheat sold to Russia—419 million bushels. Continental Grain Company received the largest benefit of any exporter, which was due to having unlawfully withheld the registry of said sales.

Antitrust Violations

46. Continental Grain Company entered into an agreement or conspiracy with Clarence D. Palmby and others unknown to Plaintiff at this time in restraint of trade or commerce among the several states and with foreign nations. Through this agreement, which provided special market information to Continental Grain Company and suppressed the information from being released to the public, the domestic market price for hard winter wheat was depressed. This being a price-fixing conspiracy, it is illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

47. The Defendants had knowledge that concerted action to suppress market information from wheat producers in order to keep prices low was contemplated and invited. With this knowledge, the Defendants gave their adherence to the scheme and participated in it. This is a price-fixing conspiracy illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

48. The Defendants agreed, reached some understanding or conspired among themselves and others unknown to Plaintiff to inflate the domestic market price for wheat after purchasing most of their needs for the Russian sale in order to increase their subsidy payments. This is a price-fixing conspiracy illegal per se under Section 1 of the Sherman Act (15 U.S.C.A. § 1).

49. The Defendants conspired among themselves and with the Secretary of the Department of Agriculture, Earl L. Butz, and other employees of the Department of Agriculture to preserve low wheat prices during the period of negotiations by the Defendant grain corporation with the Russians.

50. The Defendants, Continental Grain Company and Clarence D. Palmby, acted together in a common conspiracy which was intended to and did restrain trade and commerce among the several states and with foreign nations for their respective benefits to the detriment of producers of wheat and did by their so acting together and by their secretive dealings, as hereinabove set forth, enable Continental Grain Company to buy wheat for its own account, at and below what would have been the market value for such wheat and the price for which such wheat would have been sold except for the accomplishments by their said conspiracy in keeping secret the massive sales which was known by them but unknown to the farmers and producers of wheat grain. Such actions were predatory, anticompetitive and unfair practices made in bad faith and such conduct was inequitable and was in restraint of trade and was

not only an attempt to, but in fact did, monopolize the market in violation of law and was price fixing and illegal per se under Section 1 of the Sherman Act (U.S.C.A. § 1).

51. The Defendant, Continental Grain Company, did attempt to monopolize and hold for itself and its friends the opportunity to sell wheat to Russia and other foreign countries at higher prices and with a higher subsidy to the exclusion of other wheat dealers and producers by maintaining a blanket of secrecy concerning the above described large foreign wheat sale. The said Continental Grain Company did attempt to monopolize such trade in wheat with foreign nations and did monopolize such trade and did combine or conspire with Clarence Palmby, and others unknown to Plaintiff, to monopolize the above described sale of wheat to foreign countries in violation of Section 2 of the Sherman Antitrust Act (15 U.S.C.A. § 2). The effect of such monopoly, conspiracy to monopolize and attempt to monopolize was to maintain the price of domestic wheat at a falsely low level to the injury and damage of your Plaintiffs herein. The other grain dealers who were not privileged to obtain and have the information which Palmby made available to Continental Grain (and Continental Grain Company made available to others unknown to Plaintiff) were unaware of the true demand for wheat and therefore did not offer and would not pay as much to your Plaintiffs as they would have paid had Plaintiffs not been the victims of the monopoly, attempt to monopolize, and combination and conspiracy to monopolize above described.

Injury to Plaintiff Wheat Producers

52. As a direct result of the Defendants' conspiracy to fix prices of wheat and monopolize as hereinafter described, the Plaintiff wheat producers were injured in their business or property as specifically described:

(a) The Plaintiffs lost the difference between what they actually received for their wheat and what they

would have received for their wheat except for the conspiracy to withhold information.

(b) The Plaintiffs lost the difference between what they actually received for their wheat and and what they would have received for their wheat except for the monopoly, conspiracy to monopolize and attempt to monopolize described hereintofore.

53. During the period May 1 through September 1, 1972, the Plaintiffs sold approximately 500,000 bushels of wheat at $1.35, 60,000 bushels of wheat at $1.40 and 40,000 bushels of wheat at $1.60. The Plaintiffs' claims range from approximately $10.00 to $10,000.00. The exact amount of Plaintiffs' claims may be determined after sufficient opportunity for discovery. The claim of Plaintiff John Spearman is one of the largest of the class. The damages to the class resulting from Defendants' antitrust violations is in excess of $300,000.00. The Plaintiffs should be awarded recovery threefold the damages sustained plus costs of suit, including reasonable attorney fees, as authorized by Section 4 of the Clayton Act (15 U.S.C.A. § 15).

54. The named Plaintiff, John Spearman, lost $9,412.65 as a direct result of the said unlawful acts of the Defendants.

Relief Requested

WHEREFORE, the Plaintiff prays:

(1) That the cause of action be certified as a class action as provided by Federal Rule 23;

(2) That this named Plaintiff be certified to represent the said class;

(3) That the Plaintiffs recover threefold the damages sustained by them plus costs of suit, including reasonable attorney fees, as authorized by Section 4 of the Clayton Act; and,

(4) That the Plaintiffs have such other and further relief as may be just and proper.

DATED: September 2, 1974.

GARRETT, HARTLEY & TATUM
By: /s/ MICHAEL T. GARRETT
Attorney in Charge

JURY DEMAND

COMES Now the named Plaintiff and demands, as provided by law, a trial by jury on each and every issue in this case.

/s/ JOHN H. SPEARMAN
Plaintiff

VERIFICATION

STATE OF NEW MEXICO
COUNTY OF CURRY, ss:

JOHN SPEARMAN, on oath after having been duly sworn, states: that he is the named Plaintiff in the foregoing Complaint; that he has read said Complaint and knows the contents thereof; and, that to the best of his knowledge, information and belief, the statements and allegations therein are true and correct.

/s/ JOHN H. SPEARMAN
John Spearman

SUBSCRIBED AND SWORN To before me this 2nd day of September, 1974, at Clovis, Curry County, New Mexico, by John Spearman.

/s/ MICHAEL T. GARRETT
Notary Public
State of New Mexico

(SEAL)
My commission expires: 12-24-74

I hereby certify that I have (delivered) a copy of the foregoing pleading to opposing counsel of record this 3rd day of Sept. 1974.

/s/ MICHAEL T. GARRETT

Sherman Act

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. § 1.)

§ 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. (15 U.S.C. § 2.)

Clayton Act

§ 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (15 U.S.C. § 15.)

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Nos. 81-1021 and 81-1036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOE ZINSER, *et al.*,

Petitioners,

—v.—

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

EDGAR CLEVELAND, *et al.*,

Petitioners,

—v.—

CLARENCE PALMBY, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether this Court should reconsider its landmark decision in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977), and overturn the dismissal of the price-fixing claims of petitioners whose asserted injury resulted from the indirect "passing-on" to them of allegedly depressed wheat prices through the wheat distribution chain.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1021 and 81-1036

JOE ZINSER, *et al.*,

Petitioners,

—v.—

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

EDGAR CLEVELAND, *et al.*,

Petitioners,

—v.—

CLARENCE PALMBY, *et al.*,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

This brief in opposition is submitted by Clarence Palmby and Continental Grain Company, respondents in nos. 81-1021 and 81-1036; and Cargill, Incorporated, Louis Dreyfus Corporation, Cook Industries, Inc., and Garnac Grain Co., Inc., respondents in no. 81-1036 only.*

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* Statements of the corporate parties pursuant to Rule 28.1 of this Court are contained in the Appendix to this brief.

OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 660 F.2d 754, and contained in the appendices to the petitions. The opinions of the District Court, which are not officially reported, are appendices C and D to the petition in no. 81-1036, and reproduced at pages 22a-49a in the appendix to the petition in no. 81-1021.

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

Four years ago, in *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720 (1977), this Court held that antitrust plaintiffs may not recover for alleged injury initiated by defendants who did not deal directly with them, and "passed-on" to plaintiffs through middlemen in the distribution chain. At the same time, the Court rejected all "attempts to carve out exceptions" to its holding for particular litigants or particular markets. *Id.* at 744.

Petitioners here seek review of one of the many subsequent lower court decisions which have routinely applied *Illinois Brick* to dismiss such indirect "pass-on" claims. However, they are unable to demonstrate that the lower courts have encountered any significant difficulties in applying the straightforward *Illinois Brick* rule, or to identify a disagreement among the circuits on any issue relevant to this case. Instead, petitioners urge this Court in effect to reconsider the issues resolved in *Illinois Brick,* reintroduce to antitrust litigation the unfairness and complexity which *Illinois Brick* eliminated, and expand the reach of the antitrust laws.

These cases arise from the well-known export sales of American wheat to Russia in the summer of 1972. Petitioners—southwestern wheat farmers—allege a massive conspiracy involving top government officials and the respondent grain exporters to suppress information concerning the sales. Neither the comprehensive investigations of the sales by a half-dozen federal

agencies and two Congressional committees (which exonerated the respondents), nor exhaustive discovery undertaken in this case, has produced any evidence to support petitioners' fanciful claim of conspiracy.

According to petitioners, the purpose and effect of the "conspiracy" was to reduce the price which respondent exporters paid to grain elevators in acquiring wheat for export to Russia. As a result, petitioners claim, farmers received an "artificially low" price when they in turn sold their crops to the grain elevators. The farmers seek to recover not from the grain elevators—to whom they sold and by whom they allegedly were paid an "artificially low" price—but from the respondent exporters at the other end of the chain of distribution.

Without reaching the dubious merits of these claims, both the District Court and the Court of Appeals found with no hesitation that petitioners alleged precisely the kind of indirect, "pass on" injury barred by *Illinois Brick*. Accordingly, even were this Court inclined to consider the application of *Illinois Brick* in a context where the facts and concerns which motivated that decision are not in evidence, this is not such a case.

Nor should this Court accept petitioners' invitation to reconsider the principles underlying *Illinois Brick*. The lower courts have applied the pass-on rule in a consistent manner, and Congress has declined to change it.* Indeed, the *Illinois Brick* decision received favorable comment from this Court just last term, when it refrained from creating a right of contribution in antitrust cases, in part because of the complications such a rule would add to "what already is complex litigation." *Texas*

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* Legislation to overturn this Court's *Illinois Brick* ruling was introduced in the 95th and 96th Congresses. *See* S. 300, 96th Cong., 1st Sess. (1979); S. 1874, 95th Cong., 2d Sess. (1978); H.R. 11942, 95th Cong., 2d Sess. (1978). Petitioner Cleveland and other wheat farmers testified in support of the legislation and told Congress that their claims in this action would fail unless *Illinois Brick* were overturned. Fair and Effective Enforcement of the Antitrust Laws, Hearings on S. 1874 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 95th Cong., 2d Sess. 424 (1978). Congress did not enact the legislation.

Industries, Inc. v. *Radcliff Materials, Inc.*, ____ U.S. ____, 101 S. Ct. 2061, 2065 (1981).

These cases present no significant legal problem or recurring factual situation which merits this Court's attention. The petitions should be denied.

B. Statement of Facts

Petitioners are farmers who sold wheat during the period from May 1 until September 1, 1972.* They allege that respondents, six grain exporters and one individual, conspired to fix wheat prices during that period by suppressing information regarding the prospects for, and later the fact of, the 1972 sales of American grain to the Soviet Union. Petitioners claim that this alleged conduct constituted a conspiracy to fix prices and a per se violation of Section 1 of the Sherman Act. JA 168-82; 81-1021 Pet. App. 51a-88a.**

The Russian Wheat Sales

Although the history of the Russian wheat sales is not strictly necessary for disposition of these petitions, we provide, as background for the Court, a brief statement of facts developed in extensive discovery in the District Court and in several government investigations of the sales. That evidence es-

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* Three plaintiff classes were initially certified by the District Court, consisting of farmers in the State of Oklahoma (the *Cleveland* case); in 34 counties in and near the "Panhandle" region of Texas (the *Zinser* case); and in Curry County, New Mexico (the *Spearman* case). The *Cleveland* plaintiffs are petitioners in no. 81-1036, and the *Zinser* and *Spearman* plaintiffs have joined as petitioners in no. 81-1021. All respondents are defendants in the *Cleveland* case; only respondents Continental Grain Company and Clarence Palmby are parties in *Zinser* and *Spearman*. The three actions were consolidated for pretrial proceedings in the United States District Court for the Western District of Oklahoma, under 28 U.S.C. § 1407, by the Judicial Panel on Multidistrict Litigation, in November 1973.

** "JA" refers to appellants' joint appendix filed in the Court of Appeals, and "Pet. App." to one of the appendices to the petitions filed in this Court.

tablishes that there is no basis for the charges contained in the petitions and that petitioners' claims on the merits rest upon unsupported allegations and innuendo. Such a record is plainly an insufficient factual basis for a close examination by this Court of the implications of the *Illinois Brick* rule in antitrust litigation.

In two brief visits to the United States in July and August 1972, Russian negotiators contracted in separate transactions with the six respondent grain companies to purchase a total of nearly 20 million tons of American wheat and corn. Cumulatively, it was the largest grain transaction in American history. S. Rep. No. 93-1033, 93d Cong., 2d Sess. 1, 67 (1974), reprinted in JA 286, 348. The swiftness and magnitude of the sales—and their later impact on the American wheat market—took the grain companies completely by surprise.

The undisputed evidence, including the deposition testimony of each of the principals involved in the grain trades, shows that respondents had no advance information concerning the sales and hence could not have conspired to suppress such information. For example, at the very time that respondent Continental Grain Company allegedly had advance word of the transaction and therefore should have been accumulating wheat for export, the undisputed record shows that the company was selling wheat, depleting its stocks and creating a net short position. SA 87, 125-26, 147.* Likewise, when the Russian buying mission arrived in New York to open negotiations, the company's top executives—far from awaiting them on the basis of advance information—were scattered abroad and unavailable. SA 31, 81-83, 126-28, 148.

As the Senate Permanent Subcommittee on Investigations of the Committee on Government Operations concluded, after a year of staff investigations of the Russian sales:

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* "SA" refers to appellees' Supplemental Appendix filed in the Court of Appeals.

> "[T]he record does not reveal that anyone, either in the grain companies or in the Government service, had any advance notice as to the Russians' intentions and hence capitalized on inside information." JA 342.

In addition to the Senate Subcommittee, the Justice Department, the General Accounting Office ("GAO"), the Inspector General of the Department of Agriculture, and a House Committee all undertook investigations of the sales, and uniformly concluded that respondents had not misused inside information. The Comptroller General of the United States, after a GAO investigation of grain company profits on the 1972 sales, reported to Congress that the grain companies "either did not have inside information on Russian buying intentions or did not take advantage of any such information." SA 45.

Furthermore, the record demonstrates unequivocally that respondents did not communicate with each other regarding the sales. Far from conspiring with their market rivals, respondents acted consistently with normal and lawful practice in the grain trade, guarding their views about the sales as trade secrets not to be disclosed to anyone. SA 139-41. In addition, the evidence shows that information about the sales which petitioners claimed was "suppressed" was actually widely disseminated in the media. Throughout the spring and summer of 1972, an avalanche of newspaper and magazine articles disclosed crop disasters in the Soviet Union and speculated on and then reported the Russian purchases. Record on Appeal, Vol. 13 at 3650-3716.

Finally, petitioners' scandalous charges that respondent Clarence Palmby conspired with or passed advance information to respondent Continental are utterly undocumented and unfounded. After completion of its inquiry into the grain sales, the Justice Department wrote as follows to the Senate Subcommittee also investigating the sales:

> "[I]t should be noted that neither the Subcommittee hearings nor our earlier investigation adduced *even a scintilla of evidence* that Mr. Palmby provided inside information to Continental Grain Company or in any

other unlawful way placed that company in a favored position in the Russian Grain transactions." JA 309 (emphasis added).

The undisputed record demonstrates that Soviet-American discussions about grain credits—the alleged source of Mr. Palmby's advance information that the sales would take place—did not succeed until after Mr. Palmby's departure from the government. JA 293. Nor was Mr. Palmby in a position to deny an alleged Russian request to buy wheat directly from the United States Government, as petitioners insinuate. 81-1021 Pet. 5. It was and remains established American Government policy to use private grain sources whenever possible; in fact, before government-to-government sales could have been made, the Secretary of Agriculture was required by law to find that private commercial channels could not be used. 15 U.S.C. §§ 713a-13, 714c; SA 158-59, 196-97. The American Government has never taken the economic risk of selling wheat to Russia; both before and after 1972, all such sales have been made and all such risks have been borne by private exporters.

Consequently, petitioners' claims on the merits are without foundation. Respondents submit that this Court should not undertake a review of the pass-on rule in a case where the record contains no probative evidence of an antitrust violation.

Proceedings Below

Petitioners' complaints were filed between October 1972 and January 1973. 81-1036 Pet. App. 3. Petitioner farmers claimed that the alleged conspiracy enabled the respondent grain companies to purchase wheat at depressed prices from middlemen in the wheat distribution chain (for example local grain elevators), and that, as a result, the middlemen in turn offered lower prices for petitioners' wheat.* As the Court of Appeals found,

* We discuss here the claims of petitioners who did not sell wheat directly to any of the respondent grain companies. The claims of the remaining members of the plaintiff classes who did sell directly were dismissed without prejudice and are not at issue in this petition. Several direct sellers filed new actions which are now being litigated in the District Court.

"according to the complaints since the middlemen sold wheat to the grain exporters at lower prices than would have been paid if the information about forthcoming sales to the Soviet Union had been publicly known, the middlemen, in turn, purchased wheat from the wheat farmers at reduced prices. It was on this general theory that [petitioners] claimed antitrust violations and treble damages." *Id.* at 5.

The wheat distribution chain in which petitioners and respondents take part consists of many layers, including thousands of local and regional elevators—both co-ops and independents—plus countless dealers, brokers and processors. SA 11-14. Petitioners are at one end of the chain and respondents at the other; between them are numerous middlemen. To prove the existence and amount of their alleged injury, therefore, each petitioner would have to prove precisely how much of the alleged "undercharge" was absorbed by each middleman who bought and resold his crop, and how much that middleman was able to "pass on", in the form of reduced prices, to the next level in the chain.

In July 1977, after extensive discovery on the merits was completed, respondents moved for summary judgment dismissing the complaint, on several grounds. Respondents argued, *inter alia*, that petitioners' claims should be dismissed under the decision the previous month in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720 (1977). *Illinois Brick* involved the claims of indirect purchasers of concrete block, who alleged that defendant manufacturers had conspired to fix the prices at which defendants sold to middlemen. Plaintiffs in *Illinois Brick* sued to recover alleged overcharges "passed on" from defendants, through the middlemen, and finally to them. This Court held that claims of indirect, passed-on injury in the distribution chain for a product could not be maintained by persons removed from the alleged antitrust violators and dismissed that suit.

Respondents' summary judgment motion precipitated a lengthy and painstaking review of the factual and legal issues

relating to *Illinois Brick*. Discovery was reopened and extensive new briefs were filed. After a full-day hearing, during which petitioners were repeatedly called on to offer any evidence that would take them outside the ambit of *Illinois Brick*, the District Court held in June 1979 that petitioners' claims must be dismissed under *Illinois Brick*.* A unanimous panel of the Court of Appeals affirmed, and denied petitions for rehearing and suggestions for rehearing *en banc*. 81-1036 Pet. App. 18.

Both courts found that petitioners alleged precisely the type of indirect, pass-on injury considered by this Court in *Illinois Brick*. In addition, the two courts found that, in spite of a generous opportunity to take discovery and present evidence on these issues, petitioners had failed to make any factual showing to distinguish the case from the holding of *Illinois Brick* or to bring themselves within either of the two exceptions articulated in *Illinois Brick*.**

Consequently, the claims of all petitioners who had not sold wheat directly to a respondent were dismissed with prejudice

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* The District Court did not reach the other grounds of respondents' summary judgment motion. Those other grounds were: (1) that discovery had produced no evidence to support any of the essential allegations of petitioners' claims that respondents participated in a conspiracy, or possessed inside information; (2) because information about the Russian sales was public long before and throughout the relevant period, petitioners could not conceivably have been injured by an alleged conspiracy to "suppress" such information; (3) as a matter of law, the alleged conspiracy could not constitute an antitrust violation, *see Arizona* v. *Cook Paint and Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on the opinion below*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977); and (4) petitioners' claims of conspiracy among the grain companies and government officials are barred under the *Noerr-Pennington* doctrine.

** These exceptions are relevant where plaintiffs demonstrate (1) that there are pre-existing, fixed-quantity, cost plus contracts between purchasers and sellers at each level of the distribution chain (the "cost-plus contracts" exception); or (2) that the middlemen in the distribution chain are owned or controlled by the alleged antitrust violator (the "owned or controlled" exception). No such showing has been made here.

under *Illinois Brick*.* In addition, petitioners' unusual requests for awards of attorneys' fees were denied by the District Court and the Court of Appeals, on the ground that unsuccessful litigants have no legal right to such recoveries.

SUMMARY OF ARGUMENT

The decisions of the courts below represent an unexceptional application of the rule of *Illinois Brick*. As those courts found, petitioners claim precisely the kind of indirect, "pass-on" injury alleged in *Illinois Brick*, and the wheat distribution chain presents the same kind of complexities considered there. This case raises no significant or difficult issues regarding application of the pass-on rule worthy of review by this Court.

There is no conflict among the circuits. Instead, the federal courts have applied *Illinois Brick* in a regular and consistent manner, and the decisions rendered in this case are in full accord with other courts which have construed *Illinois Brick*.

The claim of petitioners in 81-1021 that attorneys' fees should be awarded to counsel for an unsuccessful class is wholly without merit.

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* The District Court also held, in its discretion, that the comparatively few farmers who sold directly to a defendant did not constitute a proper class, and dismissed their claims, without prejudice to the filing of individual actions. That holding, which was affirmed by the Court of Appeals, is not challenged here.

REASONS FOR DENYING THE WRIT

I

THIS CASE PRESENTS A STRAIGHTFORWARD APPLICATION OF THE *ILLINOIS BRICK* RULE, RAISING NO ISSUE WORTHY OF REVIEW BY THIS COURT

Petitioners' central contention is that both the District Court and the Court of Appeals "expanded and seriously misapplied" this Court's decision in *Illinois Brick* (81-1036 Pet. 5). However, despite petitioners' awkward attempts to characterize their claims otherwise, it is plain that those claims fall squarely within the *Illinois Brick* rule. Petitioners' request that this Court invoke its power of supervision to correct the "incredible error" of the courts below (*id.* at 14) should therefore be denied.

Illinois Brick bars claims for injury allegedly passed on indirectly from the antitrust violator, through one or more middlemen in the chain of distribution, to the plaintiff. It was expressly found below that petitioners' claims here stem from just such "passed-on," indirect injury. The Court of Appeals found that the claimed injury arose—if at all—in the following manner:

> "[S]ince the middlemen sold wheat to the grain exporters at lower prices than would have been paid if the information about forthcoming sales to the Soviet Union had been publicly known, the middlemen, in turn, purchased wheat from the wheat farmers at reduced prices." 81-1036 Pet. App. 5.

This determination below was unquestionably correct. Because petitioners never dealt directly with respondents, petitioners could have been injured *only* if the middlemen with whom they did deal passed along a fraction of the alleged "undercharge" to them. Their contention is that farmers were

paid an unfairly low price by middlemen because the middlemen were receiving an unfairly low price on resale to the grain exporters. Indeed, if no such "pass-on" took place, petitioners would not have been injured at all, and would have no claim against the exporters. Consequently, petitioners' claims are fully analogous to the claims barred in *Illinois Brick*.

This Court's holding in *Illinois Brick* stemmed in part from its concern about the evidentiary complexities generally created by an effort to prove such indirect claims. Based on that concern, the Court adopted an across-the-board rule against all indirect claims, expressly rejecting attempts to "carve out exceptions to the [pass-on] rule for particular types of markets." 431 U.S. at 744. As the Court explained, "the process of classifying various market situations according to the amount of pass-on likely to be involved and its susceptibility of proof in a judicial forum would entail the very problems that the . . . rule was meant to avoid" (*id.* at 744-45).

There is no reason to re-examine that prophylactic rule here, because the very evidentiary complexities which led to the *Illinois Brick* holding are present in this case. The Court of Appeals found that the wheat distribution chain—through which petitioners would have to trace the alleged "undercharge", step by step, in order to calculate their damages—is at least as complex as the concrete block market which was at issue in *Illinois Brick*:

> "The distributive chain in *Illinois Brick*, therefore, resembles that which often exists in the wheat industry, at least in the number of links in the distributive chain. The wheat farmers often sell to county grain elevator companies, which, in turn, sell to larger companies, which sell to the defendants. This is not always true, since, in some cases, farmers sell directly to the defendant grain companies.* In other cases, farmers deal directly with farmer

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* In the case of such direct claims, it was held below, independent actions may be brought.

> cooperatives. Also, the wheat sometimes is handled by only one middleman, who, in turn, deals with the defendants. As indicated, however, in many cases there are four links in the distributive chain, just as there are in the concrete block industry which was scrutinized in *Illinois Brick*." 81-1036 Pet. App. 10 n.8.

If petitioners were allowed to maintain their claims, it would be necessary to determine, at each level in this complex distribution chain, to what extent the price received by a farmer resulted from the middleman's labor costs or profit margins, or other economic factors, and to what extent it was attributable to the alleged activities of respondent exporters at the distant end of the distribution chain.*

Consequently, the courts below concluded without difficulty that both the holding and the rationale of *Illinois Brick* apply to petitioners' claims.

The lower courts found only one factual difference between this case and *Illinois Brick;* here petitioners are indirect sellers of the allegedly price-fixed good, rather than indirect buyers as in *Illinois Brick*. However, the lower courts properly found that the rationale of *Illinois Brick* is applicable to buyers and sellers alike. There is no conflict among the circuits on this point. The Tenth Circuit here followed the decision of the Fifth Circuit in

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* By the same token, awarding indirect claimants such as petitioners a cause of action would bring into play the problem of multiple recovery which was another motivation for the *Illinois Brick* rule. That problem results from *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), which held that alleged antitrust violators, when sued by middlemen who dealt directly with them, cannot reduce their liability by proving that the middlemen passed on a portion of the injury to the next level in the distribution chain. If defendants cannot use this defense, and must repay the full amount of any illegal overcharge or undercharge to a middleman (such as a country elevator), they would be subject to duplicative liability if indirect claimants, such as petitioners, could also sue. *Illinois Brick* solved this problem by concentrating the full amount of the claim in the middleman who dealt directly with the alleged violator, and denying indirect claimants a cause of action.

In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980), which held that *Illinois Brick* applied to the claims of indirect sellers.*

Petitioners do not quarrel with the principle that *Illinois Brick* applies equally to sellers' claims. Instead, in an effort to argue that *Illinois Brick* was "misapplied," petitioners contend that this is not a price-fixing case. They attempt to dress up their claim as alleging a grand "conspiracy to interfere with the natural workings of the entire competitive market and its forces of supply and demand. . . ." 81-1021 Pet. 13. Thus, petitioners declare that "the true market force [was] attended from outside the distribution chain which left the price of wheat suppressed to a range of prices which would exist if, in a freemarket [sic], there was a limited demand for wheat." *Id.* at 17 n.20. But all this is merely a clumsy way to say "price fixing". Price fixing is what petitioners alleged in all of their many complaints, and price fixing was the claim upon which the parties conducted discovery and litigated for seven years in the district court. And, of course, price fixing was precisely the claim which this Court considered, and rejected, in *Illinois Brick*.

Furthermore, petitioners' belated attempts to re-label their claims bring them right back within *Illinois Brick*. If, as petitioners contend, the alleged antitrust violation affected "the entire competitive market," how does the court determine

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* The Tenth Circuit held as follows on this point:

> "From *Illinois Brick*, we learn that in an antitrust treble damage case involving price-fixing the plaintiff must have dealt directly with the alleged violator. We recognize that in *Illinois Brick* the plaintiffs were buyers, whereas, in the instant cases, the plaintiffs are sellers. Such fact, however, does not render the rule of *Illinois Brick* inapplicable. In the instant cases, the claim is that, because the defendants violated the antitrust laws, they were able to buy wheat at depressed prices from middlemen, and that the middlemen, in turn, purchased wheat from the plaintiffs at reduced prices. In *Illinois Brick*, an indirect purchaser could not recover for an overcharge which had been passed on to him. It logically follows that an indirect seller, *i.e.*, one who did not deal with the defendant, may not recover for an undercharge set in motion by the indirect buyer's unlawful activities." 81-1036 Pet. App. 11.

the extent to which it fell on petitioners rather than the middlemen? And how are the respondents protected against multiple recovery when sued by middlemen claiming that, as part of the "entire competitive market," they too were hurt? It is just this pervasive effect which creates the problems of apportionment and multiple recovery which *Illinois Brick* sought to avoid.*

Consequently, even were this Court inclined to examine the application of the pass-on rule in a case where plaintiffs allege an antitrust violation different from that claimed in *Illinois Brick,* or where problems of complex economic proof and multiple recovery are minimized, this is not such a case.

In reality, then, petitioners seek not to correct a "misapplication" of *Illinois Brick*, but to overrule it. Petitioners frankly reveal their hostility to *Illinois Brick* when they state their mistaken belief that: "*Illinois Brick* itself is a sharp departure from prior precedent, and difficult to reconcile with those cases which emphasize the breadth of the remedy of the antitrust laws." 81-1021 Pet. 19. Petitioners come to bury *Illinois Brick,* not to enforce it.

In their search for a cert-worthy issue, petitioners make several other miscellaneous arguments, each unavailing. Petitioners in no. 81-1021 argue that this case is distinguishable from *Illinois Brick* because they have alleged that respondent Continental Grain Company "monopolized" the 1972 wheat sale to the Soviet Union, in violation of section 2 of the Sherman Act. 81-1021 Pet. 5. However, the District Court

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* Petitioners' erroneous reliance upon *Pollock* v. *Citrus Associates of the New York Cotton Exchange, Inc.*, 512 F. Supp. 711 (S.D.N.Y. 1981) (81-1021 Pet. 11-12, 18), is achieved only at the expense of a complete misstatement of the holding in that case. Unlike petitioners here, plaintiffs in *Pollock* dealt directly with the alleged violators. Petitioners state that, because plaintiffs in *Pollock* alleged "tampering with the entire market, the court did not bother to look for direct dealings to determine if plaintiffs could bring their cause of action." *Id.* at 12. But the *Pollock* Court stated just the opposite, finding as a fact that there was no question that "the plaintiffs and defendants . . . were in direct contact insofar as they were on opposite sides of the [relevant] market." 512 F. Supp. at 718 n.7.

found that "the [§] 2 claims of monopolistic practices can be disregarded as being surplusage," and refused to certify them for class treatment and merits discovery. JA 189. Consequently, these claims are not before this Court with respect to the absent members of the *Zinser* and *Spearman* class, and have not been subjected to discovery or development in the courts below. They present no significant issue worthy of review.

Most important, as the Court of Appeals noted (81-1036 Pet. App. 5 n.4), the section 2 claims at best allege the same pass-on injury claimed under section 1, and *Illinois Brick* applies to them in precisely the same manner. There is no conflict among the circuits on this point. In *In re Beef Industry Antitrust Litigation,* 600 F.2d 1148 (5th Cir. 1979), *cert. denied,* 449 U.S. 905 (1980), the Fifth Circuit rejected precisely the same argument which petitioners make here. "Because *Illinois Brick* adopted a unified 'mutuality' approach to passing-on problems, we must reject the appellants' argument that *Illinois Brick* has no application . . . insofar as they seek relief for violations of Section 2 of the Sherman Act." 600 F.2d at 1157.

Finally, apparently attempting to take advantage of the recognized exception to *Illinois Brick* which applies where middlemen are "owned or controlled" by the alleged antitrust violators, petitioners in no. 81-1036 mistakenly argue that farmers who sold their wheat to farmer cooperatives should be permitted to sue, on the theory that the cooperatives allegedly are owned and controlled by their farmer-members. But the "owned or controlled" exception to *Illinois Brick* applies only to entities controlled by the alleged violator, and *not* the alleged victim. The rationale for the exception is simply not present unless the prospective defendants, through their ownership or control of intermediaries in the distribution chain, would be in a position to insulate themselves from antitrust attack. Moreover, petitioners simply ignore the District Court's factual finding that the cooperative is an independent legal entity "separate and apart from its members," and its conclusion that petitioners failed to make a factual showing that the "owned or controlled" exception applies here. 81-1036 Pet. App. 24. Nor

do petitioners reveal that this point was never raised by them in the Court of Appeals. There is no justification for review of that issue here.

The conclusion is clear that there is no "misapplication" of *Illinois Brick* in this case, requiring the remedial grant of certiorari requested by petitioners.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS

Petitioners contend at some length (81-1021 Pet. 14-18; 81-1036 Pet. 9-14) that the decision below conflicts with earlier rulings of other federal courts of appeals. However, they fail to identify a single specific relevant issue upon which those courts differ. On the contrary, the lower federal courts have had little difficulty applying the *Illinois Brick* rule to claims of pass-on injury such as petitioners allege.* The Court of Appeals' decision here is in full accord with this substantial, consistent body of law.

In their attempt to create a conflict, petitioners in no. 81-1021 depend primarily upon a few sentences of dictum contained in a footnote in *Mid-West Paper Products Co.* v. *Continental Group, Inc.*, 596 F.2d 573, 585 n.47 (3d Cir. 1979). (81-1021 Pet. 15.) In *Mid-West*, the Third Circuit actually followed *Illinois Brick*, affirming the dismissal of the antitrust claims of indirect purchasers of consumer bags, and the Tenth Circuit in this case cited the *Mid-West* decision with approval (81-1036 Pet. App. 13 n.10). Petitioners ignore the *Mid-West*

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* See, *e.g.*, *In re Plywood Antitrust Litigation*, 655 F.2d 627, 638-643 (5th Cir. 1981); *Jewish Hospital Ass'n of Louisville, Kentucky, Inc.* v. *Stewart Mechanical Enterprises, Inc.*, 628 F.2d 971 (6th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); *In re Sugar Antitrust Litigation*, 588 F.2d 1270 (9th Cir. 1978), *cert. denied sub nom. California & Hawaiian Sugar Co.* v. *California*, 441 U.S. 932 (1979); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 497 F. Supp. 218 (C.D. Cal. 1980); *Lefrak* v. *Arabian American Oil Co.*, 487 F. Supp. 808 (E.D.N.Y. 1980); *Int'l Ass'n of Machinists and Aerospace Workers* v. *Organization of Petroleum Exporting Countries*, 477 F. Supp. 553 (C.D. Cal. 1979), *aff'd* 649 F.2d 1354 (9th Cir. 1981).

holding; however, even their carefully selected footnote does not support their position. That footnote observes merely that where a below-market fixed price is alleged by an antitrust plaintiff, some courts have awarded damages based upon the "amount of injury" suffered by plaintiffs, rather than an amount equal to defendants' presumed benefit. The *Mid-West* dictum does *not* state, as petitioners imply, that an indirect seller may recover for injury "passed-on" through a distribution chain. It obviously refers to antitrust injury qualitatively different from that alleged in *Illinois Brick*, and in this case.*

Petitioners in 81-1036 attempt to argue that the Tenth Circuit's decision cannot be squared with the Fifth Circuit's holding in *Beef Industry, supra,* claiming that "there is a conflict between these two Circuits in the application of the cost-plus exception" to *Illinois Brick*. This contention is apparently a reference to the fact that the Tenth Circuit here did not endorse the *Beef Industry* holding which defined a "functional cost-plus" exception to *Illinois Brick*. However, petitioners ignore the fact that the Tenth Circuit found it unnecessary to decide whether to accept the "functional cost-

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* Nor can petitioners find a conflict in *Zenith Radio Corp.* v. *Matsushita Electric Industrial Co.*, 494 F. Supp. 1246 (E.D. Pa. 1980), and *Dart Drug Corp.* v. *Corning Glass Works*, 480 F. Supp. 1091 (D. Md. 1979), two district court cases which cite *Mid-West*. Neither case involved an antitrust claim remotely similar to that alleged here. In *Zenith*, one manufacturer of consumer electronics products sued a group of foreign competitors, alleging a conspiracy to drive domestic firms out of business. No such issue is involved here. The *Zenith* court readily concluded that *Illinois Brick* did not bar plaintiff's claims, because no pass-on theory of damages was involved (494 F. Supp. at 1253-1256). Unlike the situation here and in *Illinois Brick*, the alleged injury in *Zenith* did not arise from the price paid to or received by the plaintiff; as the court noted, plaintiff in *Zenith* did not "seek to trace the passing of an overcharge or undercharge through its distribution chain" (*id.* at 1254). Similarly, plaintiff in *Dart Drug* based its claim on the allegation that the "defendant permits certain of plaintiff's competitors on the retail level to purchase directly from defendant, while it does not afford plaintiff the same opportunity" (480 F. Supp. at 1096 n.7). Accordingly, the court found that pass-on was irrelevant to the case. Again, no such issue is present here or was involved in *Illinois Brick*.

plus" test, because it determined, based on the record presented, that petitioners do not come within the exception as outlined by the *Beef Industry* court. The Tenth Circuit unequivocally stated that: "Recognizing that the Fifth Circuit in *Beef Industry* held that plaintiffs came within an exception to the rule of *Illinois Brick*, we do not believe the plaintiffs in the instant case have brought themselves within any such exception." 81-1036 Pet. App. 12-13. Hence, this "conflict" is illusory.*

Petitioners also maintain (81-1021 Pet. 16; 81-1036 Pet. 10-13) that the Tenth Circuit's decision conflicts with *In re Fine Paper Litigation*, 632 F.2d 1081 (3d Cir. 1980), *Royal Printing Co.* v. *Kimberly-Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), and *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980). A brief examination of these holdings shows that they are inapposite.

In *Fine Paper*, direct purchasers assigned to the indirect purchaser their antitrust claims arising from the sellers' alleged price-fixing conspiracy. Because of the assignment, the indirect purchaser stood in the position of the direct purchasers, and the court permitted the claims to proceed. 632 F.2d at 1088-

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* Petitioners in No. 81-1036 also argue (Pet. 11) that the Tenth Circuit's decision conflicts with *Beef Industry* because "[c]attle ranchers were granted standing to pursue their antitrust claim[,] but wheat farmers were denied standing." This overly simplistic approach ignores the distinctions between the procedural posture of the two cases and between the facts established in the district court records. The Court of Appeals in *Beef Industry*, reviewing a dismissal on the pleadings, concluded that plaintiffs had alleged sufficient facts to bring their claims within the "cost-plus contract" exception to the *Illinois Brick* rule and should be given an opportunity to prove such facts at a hearing. 600 F.2d at 1163-1167. By contrast, the District Court and the Court of Appeals in the present case, reviewing a voluminous factual record on a motion for summary judgment, determined that petitioners failed to show—in their papers or at the hearing—"pre-existing, fixed-quantity, cost-plus contracts at each level of distribution" between respondent grain companies and petitioners (Pet. App. 27a; see also *id.* at 14a). Even now, petitioners have not identified any facts that might suggest the existence of such contracts, or offered any reason why this Court should review a factual determination made in the District Court and unanimously affirmed by the Tenth Circuit.

1090. Here, of course, no direct sellers to respondent grain companies have assigned their claims to petitioners.

The Court of Appeals in *Royal Printing* relied on *Illinois Brick* in sustaining the dismissal of most of plaintiffs' price-fixing claims. The court held, however, that one plaintiff, which had purchased paper products directly from a wholesaling subsidiary of one defendant-manufacturer and from a wholesaling division of another, should be allowed to proceed with its suit. This aspect of the decision was a simple application of the "owned or controlled" exception to the pass-on rule which was recognized by the *Illinois Brick* court. The *Royal Printing* court allowed plaintiff to maintain its claim because defendant-manufacturers controlled the wholesaling subsidiary and division that directly purchased their paper products, and then resold them to plaintiff. No such justification exists here. Petitioners have not established—and, indeed, do not contend in this Court—that the intermediaries to which they sold wheat were owned or controlled by the respondent grain companies.

Finally, *Fontana Aviation* is distinguishable because, as the court there found, it does not "fit within the *Illinois Brick* mold of an indirect purchaser suing the manufacturer for an overcharge" (617 F.2d at 481). The plaintiff in *Fontana* charged instead that defendants Cessna Aircraft Company, its financing subsidiary, and its independent retail dealers had conspired to drive the plaintiff out of business. There was no allegation of a conspiracy among competitors to extract excessive profits from persons at other levels in the chain of distribution. Rather, plaintiff in *Fontana* was a competitor of Cessna, from whom Cessna allegedly sought to take business. No pass-on was involved.

In sum, instead of conflict, these cases show a pattern of consistent and correct application of this Court's *Illinois Brick* decision. There is consequently no reason to grant these petitions.*

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* Petitioners' claim for expenses, costs, and attorneys' fees (81-1021 Pet. 24-25) is wholly without merit. As the District Court and the

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Dated: January 25, 1982

Respectfully submitted,

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Court of Appeals correctly held (Pet. App. 17a, 41a-44a), petitioners did not prevail in their lawsuits and they did not confer any benefit on the members of the classes they represented. Under these circumstances, they are not entitled to attorneys' fees under Section 4 of the Clayton Act, 15 U.S.C. 15, or under any equitable exception to the American rule that unsuccessful litigants must pay their own fees. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). The assertion of petitioners' attorneys that the doctrine of *quantum meruit* authorizes an award, because their legal services "would have been productive," but for this court's holding in *Illinois Brick*, is pure fancy.

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APPENDIX

APPENDIX

STATEMENTS OF CORPORATE RESPONDENTS PURSUANT TO RULE 28.1

Pursuant to Rule 28.1 of this Court, Continental Grain Company, by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:*

Ghent Grain Termina N.V.
Sobelgra
Dairy Enterprises Ltd.
Seacon Trading
Sociedad De Armazanagem E Embarque
De Graneis Soli "Gransol"
Depositos A Granel S.A.
Chai Tai Conti Limited
Molinos Champion, S.A.
Molinos Del Ecuador, C.A.
Interamericana De Tejidos, S.A.
Immobiliaria Consam
Ecuatoriana De Desarrollo S.A.
Industrias Harineras Guaxaquil S.A.
Hansa—Lagerhaus Stron, K.G.
DC Schiffahrt Poseldorf
DC Schiffahrt Pax
ContiHellas S.A.
Caribbean-Agro Industries, Limited
Continental Furness Ontwikkelings N.V.
Continentalmare
Magazzini Generali Lombardi Lungavilla
I.C.I.C. Ancona

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* Continental Grain Company is reviewing its records to determine if this list is incomplete, and will make a supplemental presentation to the Court if it so determines.

Ste Martiniquaise De Distribution De Fariness Et Al "Somadifac"
Proma
Coloidales Duche S.A.
Molinera Inca, S.A.
Sociedad Anonima Distribuidora "Sada"
Silos De Tarragona, S.A.
Promociones De Montana, S.A.
Transportes De Montana, S.A.
Interfood Espanola, S.A.
Foodpack, S.A.
Acrites Y Proteinas, S.A.
Transformaciones Agrarias Extremenas, S.A.
Manipulaciones Especiales Y Transportes, S.A.
Penibetica De Almacenajes, S.A.
Irunesa De Silos, S.A.
Alemaenes Y Descargas De Valencia, S.A.
Algra, S.A.
Maicerias Espanolas, S.A.
Silos Del Noroeste
Farinasa
Commercio Internacional Luso, Espanol, S.A.
Finagrain Trading S.A.
Arabfin
Agrocoum, S.A.
Avsco—Avigultura—Comerico E. Industria S.A.
Societe Mix le des Silos Du Port de Strasbourg
Karl Gross Silo—GMBH Brake
Pacific Seeds (THAI) Ltd.
Pacific Seeds (Philippines) Inc.
Conpe S.A.
Thermocatalitic Corporation
Santek Inc.
Russell Feed Company

Tietz Feed & Supply Company
Pork-O-Rama Research
Arkansas Protein
Conti-Fleeting
East Bank Fleeting Inc.
Birds Point Terminal Inc.
Old Holland Brewing Company
Producers Grain Corporation
Produce Exchange Realty Trust
Terminal Commercial Co.
Admiral Fund Ltd.
Conti Capital I
Conti Capital II

Pursuant to Rule 28.1 of this Court, Louis Dreyfus Corporation, by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Parent Companies

Louis Dreyfus Corporation is a wholly-owned subsidiary of Louis Dreyfus Holding Company, Inc., which in turn is a wholly-owned subsidiary of S.A. Louis Dreyfus et Cie.

Pursuant to Rule 28.1 of this Court, Cook Industries, Inc., by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

None. The current name of Cook Industries, Inc. is Cook International, Inc.

Pursuant to Rule 28.1 of this Court, Garnac Grain Co., Inc., by its attorneys, submits the following list of all its parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates:

Subsidiaries

ADNAC, Inc.

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CLERK

No. 81-1021

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

In re Wheat Farmers Antitrust Class Action Litigation M.D.L. No. 129

JOE ZINSER, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

JOHN SPEARMAN, individually, and on behalf of all others similarly situated,

Petitioners,

v.

CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONERS' BRIEF IN REPLY

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QUESTIONS PRESENTED

Whether this Court's rule in *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977), that a cause of action based on a horizontal price-fixing conspiracy cannot be brought by a party removed more than one step in the distribution chain from the price-fixer, also bars every restraint of trade claim brought pursuant to 15 U.S.C. § 1?

Whether that rule in *Illinois Brick* also bars every attempted monopolization and monopolization claim brought pursuant to 15 U.S.C. § 2?

Whether an antitrust plaintiff, who brings a class action and is successful in certifying that class, has a claim of right to reimbursement for reasonable expenses, court costs and attorneys' fees based on the doctrine of *quantum meruit* once the cause of action has, *ex post-facto*, been judicially banned?

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IN THE

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JOE ZINSER, individually, and on behalf of all others similarly situated,

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CLARENCE PALMBY and CONTINENTAL GRAIN COMPANY,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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PETITIONERS' BRIEF IN REPLY

Petitioners, Zinser and Spearman submit this Brief in Reply in support of the petition for certiorari.

STATEMENT OF THE CASE

A. The Wheat Industry's Structure

Once the wheat farmer harvests his wheat crop, he is left with two choices. The farmer can either outright sell his wheat at the prevailing market price, or store his wheat until such time as he believes the market will provide a better price. In either case, he makes his decision based upon what information is available concerning the market at that time and what the market is likely to be in the near future.

The farmer's sale in the market triggers a series of subsequent decisions to sell or store at different levels until the wheat meets its final destination. Each level's participants contemplate the current market factors such as, albeit, supply, demand and current and potential price, in order to decide whether to sell or hold for a better market.

This is the market structure with which Petitioners dealt in 1972; a market in which the wheat sold travels downward in the distribution chain based on prices negotiated at each level. Petition for Certiorari, Add. at 1.

However, the Respondents contend that the market purchases move upward in the chain of distribution. Brief in Opposition at 8. That is, the exporter purchases from the elevators, and the elevator operators in turn purchase wheat from the wheat farmers.

Respondents' contention is fundamentally faulty — where does the elevator get its wheat to sell to the exporter should a sufficient number of farmers decide to store their wheat? In essence, Respondents' theory of the wheat market is based on two incorrect assumptions: first, assuming no antitrust violation, all wheat ultimately is destined for export, with exporters alone influencing the free market from a level within the distribution chain; and second, the wheat purchased by an exporter from the elevator operator is already placed in the market's

stream. The first assumption is contrary to actual operations of the wheat market and Petitioners' allegations and the second contrary to Respondents' contentions.

B. The Antitrust Violation

Petitioners' causes of action were dismissed on the pleadings, pleadings alleging violations of the antitrust laws. These pleadings emphatically stated that Continental Grain Company and Clarence Palmby had combined and conspired to restrain trade and that they attempted to, and did successfully, monopolize the grain sale to the Soviet Union in violation of Sections 1 and 2 of the Sherman Act.

However, Respondents, in their brief in opposition, go to exceedingly great lengths in an attempt to convince this Court of their innocence of the violations as pled. [1] However strongly Respondents may wish this case away without Petitioners having a full hearing on the merits, the fact of the matter is these actions were dismissed on the pleadings alone, without regard to the merits.

Respondents hurriedly contend that this case is identical to the issues raised in *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, *rehearing denied*, 616 F.2d 659 (5th Cir.), *cert. denied, Safeway Stores, Inc.* v. *Meat Price Investigators Association*, ____ U.S. ____ , 101 S.Ct. 280 (1980) ("the *Beef Case*"), where, on the pleadings, the plaintiffs alleged that the retail stores conspiratorially purchased their beef requirements from packers who then "passed-on" the undercharge by way of purchasing cattle from the plaintiffs. Not only are the pleadings in the *Beef Case* analytically contrary to the pleadings here, but marketing in the beef industry is structured differently from that in the wheat industry.

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[1] Curiously, Respondents donated approximately one-third of their brief attempting to "exonerate" themselves of the pleadings. Such is pure surpluage.

As much as Respondents would wed themselves to the *Beef Case*, curiously the Respondents break ranks with its holding that "the allegations of the complaints . . . are taken as true. . . ." 600 F.2d at 1154. No amount of self-adulation can circumvent the uncontroverted fact that neither judge nor jury has found against these Petitioners on the merits [2] and that these pleadings are to be taken as true.

REASONS FOR GRANTING THE WRIT

A. Emphatic Distinctions Must Be Made Between The Applicability Of *Illinois Brick* To Price Fixing Claims And Its Applicability To Monopolization Claims And Other Restraints Of Trade

1. *Illinois Brick* Must be Limited to "Pass-On" Allegations Alone Respondents claim that these cases fit squarely within *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977), and rely solely on the holding in the *Beef Case* to support their position.

However, Respondent's attempt to fit a square *Wheat* case into the *Illinois Brick* hole. Respondents have arbitrarily whittled the edges of the pleadings and discarded the shavings of the pleadings' combination and conspiracy to restrain trade and attempt to monopolize and successful monopolization of the grain sale to the Soviet Union, only to relabel the allegation and fit what it likes into the *Illinois Brick* hole.

There were no "pass-on" allegations in these pleadings which pre-date this Court's decision in *Illinois Brick*. Nor had the trial court ruled that the monopolization and attempt to monopolize claims were dismissed on the merits. Accordingly, the issue presented is whether, based on the allegations taken as true, it was within the intended ambit of *Illinois Brick* to dismiss non-"pass-on" claims of monopolization, attempt to monopol-

[2] As Respondents note, the trial court never addressed Respondents' summary judgment motion dealing with the merits of this case. Brief in Opposition at 9 n.*.

ize and restraint of trade based on suppression of the market information removed from the distribution chain.

B. The *Wheat* Decision Creates A Split In Circuits On The Question Of The Scope Of *Illinois Brick* And Denies Petitioners Equal Protection Of The Laws

Respondents admit that the absence of allegations of a "pass-on" renders *Illinois Brick* inapplicable. Brief in Opposition at 20. Since Respondents premise their brief on non-existent "pass-on" pleadings, they conveniently find *Fontana Aviation, Inc.* v. *Cessna Aircraft Co.*, 617 F.2d 478 (7th Cir. 1980) has no factual bearing. However, the court in *Fontana Aviation* restricted the application of *Illinois Brick* to pure pleadings of "pass-on" antitrust allegations. The *Fontana* court held that *Illinois Brick* does not apply to any other antitrust allegation.

Respondents off-handedly dismissed the inequity posed by conflicting circuit and district court opinions as is evidenced by the footnote treatment of *Pollock* v. *Citrus Associates*, 512 F.Supp. 711 (S.D.N.Y. 1981). *Pollock* has recently been reaffirmed in the Southern District of New York by the district's heavy reliance of *Pollock* in *Stax* v. *Commodity Exchange, Inc.*, 524 F.Supp. 936 (S.D.N.Y. 1981).

Stax involved allegations that silver market participants:

> . . . [C]onspired to and did cause the price of refined silver and silver futures to rise, monopolize the trade in silver and seize control of supplies of refined silver and silver production facilities, in violation of federal and state antitrust laws . . .

524 F.Supp. at 937-938. The court, relying on *Pollock*, refused to apply *Illinois Brick* in a situation where the allegations were not injury resulting from a "pass-on," but rather injury caused by an illegal market impact which either stabilized or destabilized the entire market.

However, Respondents refuse to recognize the rationale of *Pollock* and *Stax*, preferring to stand on a footnote in *Pollock* which stated that " 'the plaintiffs and defendants . . . were in direct contact insofar as they were on opposite sides of the [relevant] market.' 512 F.Supp. at 718 n.7." Brief in Opposition at 15 n.*.

Quite clearly, the court in *Pollock* based its decision that *Illinois Brick* did not apply on a much broader principle:

> Regardless of whether the plaintiffs ultimately purchased offsetting contracts from the defendants or from other traders with a long position, the price throughout the market allegedly rose as a result of the defendants activities.

Pollock v. *Citrus Associates*, 512 F.Supp. at 719; cited with approval in *Stax* v. *Commodity Exchange, Inc.*, 524 F.Supp. at 940. *See Chatham Brass Co., Inc.* v. *Honeywell, Inc.*, 512 F.Supp. 108, 116 (S.D.N.Y. 1981) ("*Illinois Brick* does not bar a damages claim [based on Section 1 and 2 of the Sherman Act] since Chatham is complaining, not of injury resulting from the passing on of a price-fixing overcharge by middlemen, but rather of direct injury from Honeywell's alleged success in creating sufficient monopoly power to raise prices. . . .")

Accordingly, only this Court can resolve the clear split now existing between the Circuits on this very issue. The federal laws were intended to apply, and must be applied, uniformly to all persons subject to those laws. The lack of similar treatment among persons seeking to see under the antitrust laws, depending solely upon the circuit in which suit is filed or to which the Multidistrict Litigation Panel removes, creates a clear and arbitrary denial to *Zinser* and *Spearman* of the equal protection of the laws as guaranteed to them by the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, as well as in the interests of assuring effective enforcement of the federal antitrust laws, insuring even-handed administration of justice, and protecting the existence of a competitive and free market system, Petitioners respectfully request that this Court grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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February 2, 1982

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of the United States Supreme Court, has caused to be served the within Petitioners' Reply, upon all counsel of record in these proceedings as recited below on the 2nd day of February, 1982:

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